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Vol. IV
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

**FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY,
CONSTITUTING ~~INTERNATIONAL~~ BONDHOLDERS COMMITTEE,
PETITIONERS, *Institutional***

**WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO.,
THE RAILROAD CREDIT CORPORATION, ET AL.**

No. 8

**CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND
SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN
PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE
28, 1916, PETITIONERS,**

vs.

**WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN
PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC.,
ET AL.**

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. ECKER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

**WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO.,
ET AL.**

No. 61

**IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER
THE GENERAL AND REFUNDING MORTGAGE OF WESTERN
PACIFIC RAILROAD COMPANY, PETITIONER,**

vs.

**CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL.,
ETC.**

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITIONS FOR CERTIORARI FILED

**DECEMBER 30, 1941.
JANUARY 17, 1942.
FEBRUARY 28, 1942.
MARCH 30, 1942.**

CERTIORARI GRANTED APRIL 27, 1942.

No. 9714

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES, CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,
Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,
Appellees.

Transcript of Record

(Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.)

In Six Volumes

VOLUME IV

Page 1433 to 1925

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO. 10

Francis E. Fitch (Inc.), 138 Pearl St., New York.

COMMITTEE ON STOCK LIST

NEW YORK STOCK EXCHANGE

A-9504

The Western Pacific Railroad Company

(Organized under the laws of California)

(Controlled by stock ownership by The Western
Pacific Railroad Corporation of Delaware)

First Mortgage Five Per Cent Gold Bonds,

Series A, due March 1, 1946

Additional listing, Series A Bonds..... \$572,800

Authorized First Mortgage Bonds..... 50,000,000

Amount issued:

Series A, 5% Bonds..... 39,302,800

Series B, 6% Bonds..... 3,000,000*

Total listing applied for:

Series A..... 39,302,800

This additional issue:

Indenture authorized by

stockholders..... July 13, 1916

Authorized by Board of

Directors..... Sept. 4, 1928

Approved by Interstate Com-

merce Commission by its

order..... Nov. 21, 1928

I. C. C. Finance Docket No. 7123.

No other authority necessary.

*All this issue surrendered for cancellation or
redeemed as of September 1, 1927.

CAPITAL SECURITIES

		Number of Shares			
STOCKS	Par Value	Authorized by Charter	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
Classes:					
Preferred	\$100	400,000	283,000	None	283,000
Common	100	600,000	475,000	None	475,000
BONDS	Interest Rate	Amount Authorized	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
Mortgage Bonds:					
First Mortgage, due March 1, 1946:					
Series "A"	5% }	\$50,000,000*	\$39,302,800	\$38,730,000	\$38,697,100
Series "B"	6% }		3,000,000	3,000,000	None
Equipment Trust Obligations:					
Titles and dates of maturity:					
†Equipment Trust Certificates	5½%	5,600,000	5,600,000	None	2,975,000
†Equipment Trust Certificates (Series C)	5½%	3,105,000	3,105,000	None	1,863,000
••Equipment Trust Certificates (Series D)	5%	1,095,000	1,095,000	None	1,022,000

*Total amount of First Mortgage Bonds authorized under Mortgage.

†Certificates in amount of \$375,000 payable March 1st of each year from 1924 to 1937, inclusive, and \$350,000 March 1, 1938.

‡Certificates in amount of \$207,000 payable December 1st of each year from 1924 to 1938, inclusive.

••Certificates in amount of \$73,000 payable November 1st of each year from 1929 to 1943, inclusive.

(Testimony of M. J. Curry.)

(Testimony of M. J. Curry.)

New York, July 1st, 1930.

Referring to its previous applications, especially to A-8696, dated May 16, 1929, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of \$572,800 additional (of a total authorized issue of \$50,000,000) of its First Mortgage Five per cent Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M-37976 to M-38547 both inclusive, for \$1,000 each, of No. D-1104 for \$500 and Nos. C-5395 to C-5397, both inclusive, for \$100 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of issuance and distribution for sale to the public, making the total amount of Series A Bonds issued and applied for \$39,302,800.

Authority

The issuance of said \$572,800, Series A Bonds of the Railroad Company, covered by this application, was authorized by resolutions of the Board of Directors of the Railroad Company adopted Sept. 4, 1928 and their authentication was authorized by a resolution adopted by the Board of Directors on March 31, 1930. The purpose of said issuance (as more fully hereinafter described) was to finance the acquisition by Sacramento Northern Railway, a subsidiary of Railroad Company, of the lines of railroad of San Francisco-Sacramento Railroad Company, the expenditure in such acquisition amount-

(Testimony of M. J. Curry.)

ing to more than \$1,000,000, and therefore, pursuant to sub-paragraph seventh of Section 2 of Article Second of the First Mortgage of Railroad Company, dated June 26, 1916, hereinafter mentioned, a majority in amount of such portion of the capital stock of Railroad Company as was present in person or represented by proxy at a meeting of the stockholders of Railroad Company called for such purpose consented to the authentication and delivery of First Mortgage bonds and/or the payment of deposited cash therefrom with respect to the acquisition by Sacramento Northern Railway of said lines of railroad of said San Francisco-Sacramento Railroad Company, such meeting being held on August 6, 1928, at the principal office of the Railroad Company in San Francisco, California; a tally of the ballots cast by all stockholders present at said meeting disclosed that no share of stock had been voted against said consent and that the number of shares of stock voted for said consent was 275,000 shares of preferred stock and 474,994 shares of common stock of Railroad Company, being more than 99% of all of the capital stock of Railroad Company then issued and outstanding. The issuance and sale of said \$572,800 Series A Bonds at not less than ninety nine per cent of their face amount and accrued interest and for the purposes hereinafter stated was approved by order of the Interstate Commerce Commission, dated November 21, 1928, in Finance

(Testimony of M. J. Curry.)

Docket No. 7123. No further authority is required.

The Railroad Company has sold and delivered said bonds on April 23, 1930 for cash at the price of 99% of their face amount, together with accrued interest thereon, and the proceeds have been applied to the purposes for which the bonds were issued.

Opinion of Counsel

The opinion of Counsel as to the legality and validity of the issue was rendered by Mr. John B. Marsh, a member of the firm of Taylor, Blanc, Capron & Marsh, 43 Exchange Place, New York, N. Y., Mr. Carl Taylor, of that firm, being Counsel to the Board of Directors of the Railroad Company.

Purpose of Issue

The purpose of the issue of said bonds was to provide proceeds to be applied to the reimbursement of the Railroad Company for cash advances to Sacramento Northern Railway heretofore made to enable Sacramento Northern Railway to effect the purchase of the properties of San Francisco-Sacramento Railroad Company; Sacramento Northern Railway being a subsidiary of Railroad Company within the meaning of that term as defined in said First Mortgage, and the purchase by it of said properties of San Francisco-Sacramento Railroad Company having been an expenditure of a character with respect to which bonds may be issued and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage, and hav-

(Testimony of M. J. Curry.)

ing been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of November 21st, 1928, was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company of San Francisco, California), and Henry E. Cooper (18 Pine Street, New York City), Trustees. The bonds covered by this application are an additional issue of Series A Bonds of \$572,800 principal amount, all bearing interest at the rate of five per cent per annum, dated June 26, 1916, and maturing March 1, 1946.

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency, in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to in-

(Testimony of M. J. Curry.)

come derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, territory, municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The bonds are in coupon form of the denominations of \$1,000 and \$500 and \$100 and are registerable as to principal only. Coupon bonds for \$1,000 are interchangeable with registered bonds of the denominations of \$1,000, \$5,000 and \$10,000, or multiples of \$10,000. Coupon bonds for \$1,000, \$500 and \$100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding \$1 for each new bond issued upon such exchange or transfer.

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied

(Testimony of M. J. Curry.)

to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of \$50,000 on January 1st of each year, commencing with the year 1919. Series A bonds are redeemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual interest payment date, at par and accrued interest, on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been

(Testimony of M. J. Curry.)

redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in the Mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five percent in amount of the

(Testimony of M. J. Curry.)

bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Additional Bonds

The mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars; for the issuance of additional bonds to pay, or reimburse the Railroad Company for, the cost of the construction or purchase of extensions to or additional lines of railroad and for the betterment, improvement and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies and subject to the lien of the mortgage, or securities representing the same, at the rate of one thousand dollars principal amount of bonds for each one thousand dollars of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Rail-

(Testimony of M. J. Curry.):

road Company for the purposes above stated to the extent of the net proceeds of each one thousand dollars principal amount of bonds so sold for each one thousand dollars principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount, either upon surrender of the outstanding series for cancellation or upon redemption thereof. The mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed, upon proper proof and satisfactory indemnity.

Changes in Capitalization

Since December 31, 1928 (the date as of which the consolidated balance sheet contained in said previous application A-8696 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except:

First: The issuance of the \$5,000,000 of Series A 5% Bonds covered by said application A-8696; and

Second: The purchase of \$100,000 face amount of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased \$655,700); and

(Testimony of M. J. Curry.)

Third: The issuance of \$1,095,000 face amount of Equipment Trust Certificates, Series "D"; and

Fourth: The retirement of \$750,000 (face amount) of its 5½% Equipment Trust Certificates, Series "B", \$207,000 (face amount) of its 5½% Equipment Trust Certificates Series "C" and \$73,000 (face amount) of its 5% Equipment Trust Certificates, Series "D"; and

Fifth: The issuance of 8,000 additional shares of the Preferred Stock; and

Sixth: The issuance of the \$572,800 of Series A 5% Bonds, listing of which is herein applied for.

Properties

The properties of the Railroad Company are described in the original application for listing of Series A Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925, A-7277, dated September 30, 1926; A-7722 dated October 31, 1927 and A-8696, dated May 16, 1929.

Since December 31, 1928, the following important changes in mileage have occurred:

Completion of 4.63 miles additional main line yard, industry and side tracks the operation of which commenced on various dates between Jan. 1, 1929 and December 31, 1929.

(Testimony of M. J. Curry.)

Completion of .50 miles additional branch line side and spur tracks, the operation of which commenced on various dates between Jan. 1, 1929 and December 31, 1929.

Acquisition of joint interest with other carriers in .42 miles of yard tracks, operation of which commenced on various dates between Jan. 1, 1929 and December 31, 1929.

Since December 31, 1928, the Railroad Company has made the following changes in equipment:

Additions:

Locomotives, freight	5
Freight train cars:	
Automobile box	250
Flat	50
Tank	50
Caboose	5
Total additions	360

Retirements:

Freight train cars destroyed and converted:

Automobile	1
Box	4
Flat	9
Coal	1
Refrigerator	10
Caboose	1

Construction and maintenance equipment:

Outfit cars	1
Total deductions	27

Net total units added January 1, 1929 to December 31, 1929 333

(Testimony of M. J. Curry.)

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800, A-7277, and A-7722 and A-8696 for a description of the property subject to the lien of the Mortgage prior to January 1, 1929. The property on which the Mortgage constitutes a first lien includes the following:

Mileage:	Miles
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	125.08
Second main track	2.73
Yard tracks and sidings, etc.	312.74
Total track miles	1,366.96
Equipment:	
Locomotives	148
Passenger cars	13
Freight cars	5,880
Service cars	394
Floating equipment	6
Total	6,441

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series "B," Series "C" and Series "D," as follows:

Locomotives	21
Passenger cars	48
Freight cars	3,590
Service cars	1

(Testimony of M. J. Curry.)

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and The Denver and Rio Grande Western Railroad Company.

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company.

10,000 shares of the Capital Stock (entire issue) of Sacramento Northern Railway, operating 258.98 miles of main line of railroad in California.

\$5,213,475.35 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.

Deposited cash in the hands of Mortgage

Trustees, as of December 31, 1929 \$45,341.46

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the First Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the First Mortgage, additional lines of railroad.

(Testimony of M. J. Curry.)

branches and extensions, equipment and securities.

From January 1, 1929 to December 31, 1929, inclusive, the Railroad Company has expended for road and equipment (including the above described equipment) the following amounts:

Road and structures and general expenses	\$1,245,692.59
Equipment	189,714.57
Total	\$1,435,407.16

Capital Stock

All of the issued and outstanding Capital Stock, consisting of \$47,500,000 par value of Common Stock and \$28,300,000 par value of Preferred Stock, except Directors' qualifying shares of Common Stock, is held by The Western Pacific Railroad Corporation, a Delaware corporation. \$24,200,000 of the authorized capital stock of the Company, consisting of \$12,500,000 of Common Stock and \$11,700,000 of Preferred Stock is not yet issued or outstanding.

Dividends

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	\$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927	1½%	412,500
1928	—	None
1929	—	None

(Testimony of M. J. Curry.)

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	\$2,374,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

FINANCIAL STATEMENTS

Certified by D. C. De Graff, General Auditor of the Company

**CAPITAL STOCK OF SUBSIDIARY COMPANIES OUTSTANDING
AND AMOUNT OWNED BY THE WESTERN PACIFIC
RAILROAD COMPANY**

Issuing Company	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Tidewater Southern Railway Company	\$1,176,782.00	97.55%	\$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Development Company	400,500.00	100%	400,500.00
Western Refrigerator Line	15,000.00	100%	15,000.00
Western Pacific California Rail- road Company (Subscribed but not issued)	27,500.00	100%	27,500.00

OWNED BY SACRAMENTO NORTHERN RAILWAY

	Par value Capital Stock outstanding	Percentage owned by Sacramento Northern Ry.	Par value owned by Sacramento Northern Ry.
West Side Railroad	\$35,000.00	100%	\$35,000.00

OWNED BY STANDARD REALTY & DEVELOPMENT COMPANY

	Par value Capital Stock outstanding	Percentage owned by Standard R. & D. Co.	Par value owned by Standard R. & D. Co.
Tidewater Southern Railway Company	\$1,176,782.00	.18%	\$2,115.00

(Testimony of M. J. Curry.)

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS
OF AFFILIATED COMPANIES AS OF DECEMBER 31, 1929

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Co.	\$175,439.78	\$400,500.00	\$225,060.22
Tidewater Southern Railway Co.	1,223,848.94	1,147,968.00	*75,880.94
First Mortgage Bonds:			
Sacramento Northern Railroad	3,975,456.13	5,213,475.35	1,238,019.22
Total	\$5,374,744.85	\$6,761,943.35	\$1,387,198.50
Sacramento Northern Railway:			
Capital Stock:			
West Side Railroad	50,000.00	35,000.00	*15,000.00
Standard Realty & Development Co.:			
Capital Stock:			
Tidewater Southern Railway Co.	1,572.00	2,115.00	543.00
Grand total	\$5,426,316.85	\$6,799,058.35	\$1,372,741.50

THE WESTERN PACIFIC RAILROAD COMPANY AND
SUBSIDIARY COMPANIES

STATEMENT OF FUNDED DEBT AS OF DECEMBER 31, 1929

The Western Pacific Railroad Company, First Mortgage	
Gold Bonds maturing March 1, 1946:	
Issued June 26, 1916, Series A, 5%	\$19,605,300.00
Issued May 31, 1921, Series A, 5%	4,086,000.00
Issued April 24, 1925, Series A, 5%	3,933,000.00
Issued December 1 and 31, 1926, Series A, 5%	2,600,000.00
Issued September 1 and October 18, 1927, Series A, 5%	2,950,000.00
Issued April 26, 1929, Series A, 5%	5,000,000.00
Total amount outstanding December 31, 1929	\$38,174,300.00

*Denotes red figures.

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company, 5½%

Equipment Trust Certificates, Series "B":

Total amount issued February 21, 1923.....\$5,600,000.00

Par value maturing serially on the first day
of March in each year from 1924 to 1937,

inclusive 375,000.00

Par value maturing on March 1, 1938..... 350,000.00

Total amount outstanding December

31, 1929 3,350,000.00

The Western Pacific Railroad Company, 5½%

Equipment Trust Certificates, Series "C":

Total amount issued March 10, 1924.....\$3,105,000.00

Par value maturing serially on the first day
of December in each year from 1924 to

1938, inclusive 207,000.00

Total amount outstanding December 31, 1929..... 1,863,000.00

The Western Pacific Railroad Company, 5%

Equipment Trust Certificates, Series "D":

Total amount issued June 3, 1929.....\$1,095,000.00

Par value maturing serially on the first day
of November in each year from 1929 to

1943, inclusive 73,000.00

Total amount outstanding December 31, 1929..... 1,022,000.00

Tidewater Southern Railway Company, First Mortgage

Thirty-Year Five Per Cent. Gold Bonds, maturing April

15, 1942, issued April 15, 1912:

Total amount outstanding December 31, 1929..... 169,000.00

Sacramento Northern Railroad, First Mortgage, Twenty

Year Five Per Cent. Gold Bonds, issued July 1, 1918,

and maturing July 1, 1938, payment of which has been
assumed by Sacramento Northern Railway (subsidiary

(Testimony of M. J. Curry.)

of Railroad Company), the successor in ownership of all the property of the Sacramento Northern Railroad:

Total amount outstanding December 31, 1929 \$5,224,373.14

Less amount owned by The Western Pacific

Railroad Company and pledged under its

said. First Mortgage 5,213,475.35

10,897.79

Amount of note of Bisbee Investment Company, dated January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station, property of Sacramento Northern Railway in the City of Sacramento, which property was acquired by said Railway subject to said mortgage, which must be paid by Sacramento Northern Railway, outstanding on December 31, 1929 60,000.00

THE WESTERN PACIFIC RAILROAD COMPANY
AND SUBSIDIARY COMPANIES

CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1928, AND YEAR ENDED DECEMBER 31, 1929

	Year ended Dec. 31, 1928	Year ended Dec. 31, 1929
Freight revenue	\$15,974,136.62	\$16,358,102.72
Passenger revenue	1,870,789.89	2,187,700.11
Mail and express revenue	476,943.11	560,197.38
Miscellaneous revenue	1,099,981.29	990,618.68
Total revenue	\$19,421,850.91	\$20,096,618.89
Expenses operating	\$15,602,657.24	\$16,732,912.77
Taxes	1,312,850.80	1,467,522.66
Uncollectible railway revenues	889.85	1,325.25
Operating income	\$2,505,453.02	\$1,894,858.21

(Testimony of M. J. Curry.)

Other income:

Rental of property	605,940.13	660,107.01
Hire of equipment, receipts	1,335,765.29	1,418,910.88
Dividend income	7,725.00	185.00
Income from funded securities	39,168.39	22,715.42
Income from unfunded securities and accounts	115,067.72	96,683.08
Miscellaneous income	412.65	328.67
Gross income	<u>\$4,609,532.20</u>	<u>\$4,093,788.27</u>

Income deductions:

Interest on funded debt, First Mortgage Bonds	\$1,675,917.28	\$1,843,664.61
Interest on funded debt, Equipment Notes	332,598.75	322,826.61
Interest on funded debt, advances	294,821.63	297,926.30
Rental of leased property	222,956.94	232,674.53
Hire of equipment, payments	1,265,994.06	1,171,651.44
Miscellaneous deductions	40,692.37	79,980.86
Amortization of discount on funded debt	124,441.73	130,972.48
Total deductions	<u>\$3,957,422.76</u>	<u>\$4,079,696.83</u>

Net income	<u>\$652,109.44</u>	<u>\$14,091.44</u>
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Earned per share on Common Stock		
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(Testimony of M. J. Curry.)

**THE WESTERN PACIFIC RAILROAD COMPANY AND
SUBSIDIARY COMPANIES**

**ANALYSIS OF SURPLUS ACCOUNT CHANGES—DECEMBER 31,
1928 TO DECEMBER 31, 1929**

	Year ending Dec. 31, 1929
Net income	\$14,091.44
Add: Net miscellaneous credits	66,187.10
Total	\$80,278.54
Deduct:	
Net miscellaneous debits	\$30,099.27
Dividends on Preferred Stock	None
Total deductions	\$30,099.27
Surplus—Increase	\$50,179.27
Surplus credit balance—December 31, 1929	\$7,219,128.45
Surplus credit balance—December 31, 1928	\$7,168,949.18
Increase	\$50,179.27

**THE WESTERN PACIFIC RAILROAD COMPANY AND
SUBSIDIARY COMPANIES**

**CONSOLIDATED GENERAL BALANCE SHEET, DECEMBER 31,
1928 AND DECEMBER 31, 1929**

ASSETS

	Dec. 31, 1928	Dec. 31, 1929
Investments:		
Investment in railroad and equipment	\$134,075,252.17	\$137,832,688.69
Investment in real estate and improve- ments	1,050,431.10	1,085,363.12
Sinking Funds	50,687.36	50,233.92
Deposits in lieu of mortgaged property sold	13,134.59	4,850.00
Miscellaneous physical property	1,411,492.00	1,915,076.95
Other investments	1,623,064.83	1,544,750.30
Total investments	\$138,224,062.07	\$142,432,964.98

(Testimony of M. J. Curry.)
Current assets:

Cash	2,030,070.21	1,596,289.57
Deposits of mortgage trust funds	40,841.46	40,841.46
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	156,215.94	156,864.60
Loans and notes receivable		9,709.70
Traffic and car service balances receivable	706,522.76	523,332.58
Net balances receivable from agents and conductors	210,984.33	222,549.91
Miscellaneous accounts receivable	1,320,103.13	1,289,034.69
Material and supplies	3,134,174.82	3,129,323.72
Interest and dividends receivable	12,248.65	11,330.25
Other current assets	14.74	89.74
Total current assets	\$7,657,869.96	\$7,026,062.14

Deferred assets:

Working fund advances	\$5,382.39	\$5,665.59
Total deferred assets	\$5,382.39	\$5,665.59

Unadjusted debits:

Rents and insurance premiums paid in advance	\$49,415.06	\$49,302.29
Discount on funded debt	1,927,374.82	1,958,634.10
Other unadjusted debits	830,464.85	733,376.05
Total unadjusted debits	\$2,807,254.73	\$2,741,312.44

Total assets	\$148,694,569.15	\$152,206,005.15
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Excess of par value over book value of capital stock and bonds of subsidiary companies

1,372,236.50	1,372,741.50
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Total assets	\$147,322,332.65	\$150,833,263.65
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(Testimony of M. J. Curry.)

LIABILITIES

	Dec. 31, 1929	Dec. 31, 1929
Capital Stock:		
Common	\$47,528,719.00	\$47,526,699.00
Preferred	27,500,000.00	28,300,000.00
Premium on Capital Stock	498,238.00	498,238.00
Total stock	\$75,526,957.00	\$76,324,937.00
Long term debt:		
Funded debt (First Mortgage Gold Bonds)	\$33,501,197.79	\$38,414,197.79
Funded debt (Equipment Trust Certificates)	5,795,000.00	6,235,000.00
Total long term debt	\$39,296,197.79	\$44,649,197.79
Debt to affiliated companies:		
Open accounts	\$8,526,646.43	\$4,838,739.75
Total debt to affiliated companies	\$8,526,646.43	\$4,838,739.75
Current liabilities:		
Loans and notes payable	\$1,034,260.00	\$1,014,647.24
Traffic and car service balances payable	582,701.67	629,875.95
Audited accounts and wages payable	1,205,613.01	1,309,584.46
Miscellaneous accounts payable	247,345.27	252,739.51
Interest matured unpaid	14,009.78	15,077.72
Funded debt matured unpaid	11,100.00	11,100.00
Unmatured interest accrued	665,549.21	720,035.60
Unmatured rents accrued	4,883.32	4,804.16
Other current liabilities	84,442.93	82,280.45
Total current liabilities	\$3,849,905.19	\$4,040,145.09
Deferred liabilities:		
Other deferred liabilities	\$26,913.19	\$16,483.28
Total deferred liabilities	\$26,913.19	\$16,483.28

(Testimony of M. J. Curry.)

Unadjusted credits:

Tax liability	\$277,018.09	\$220,629.25
Accrued depreciation—Equipment	5,244,744.98	6,070,695.76
Other unadjusted credits	233,444.01	281,750.49
Surplus—Investment, equipment and other property purchased	7,171,556.79	7,171,556.79
Total unadjusted credits	\$12,926,763.87	\$13,744,632.29

Surplus:

Additions to property through income and surplus	\$5,786,743.36	\$6,758,472.14
Funded debt retired through income and surplus	499,928.73	549,884.98
Sinking fund reserves	319,102.88	353,651.42
Profit and loss balance	563,174.21	•442,880.09
Total surplus	\$7,168,949.18	\$7,219,128.45
Total liabilities	\$147,322,332.65	\$150,833,263.65

*Denotes italic figures.

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

(Testimony of M. J. Curry.)

Agreements

The Western Pacific Railroad Company, in consideration of the listing of the securities covered by this application, agrees with the New York Stock Exchange as follows:

To notify the New York Stock Exchange promptly of any change in the general character or nature of its business.

To notify the New York Stock Exchange immediately if it or any subsidiary or controlled company should dispose of any property or of any stock interest in any of its subsidiary or controlled companies, when such disposal would impair or materially affect its financial position or the nature or extent of its operations as theretofore conducted.

Subject to I. C. C. regulations, to publish periodical statements of earnings, as agreed upon with the Committee.

To publish at least once in each year and submit to stockholders at least fifteen days in advance of the annual meeting of the corporation, a Balance Sheet, an Income Statement for the last fiscal year and a Surplus statement of the applicant company as a separate corporate entity and of each corporation in which it holds directly or indirectly a majority of the voting stock; or, in lieu thereof, eliminating all intercompany transactions:

(a) a similar set of financial statements fully consolidated as to the applicant company and all corporations in which it owns directly or indirectly a majority of the voting stock, or

(Testimony of M. J. Curry.)

(b) a similar set of financial statements consolidated as to the applicant company and specifically named or described subsidiaries, with separate similar financial statements for each unconsolidated corporation in which the applicant company holds directly or indirectly a majority of the voting stock.

Such statements shall disclose fully the nature and extent of the interest of the applicant company in the corporations whose unconsolidated financial statements are furnished, and also the existence of any default in interest, cumulative dividend requirements or sinking fund or redemption fund requirements of any of the corporations whose accounts are thus consolidated or separately shown.

Subject to I. C. C. regulations, to publish all future annual financial statements of any character, in the form contained in the listing application and, in the publication of reports of earnings for any period of less than a fiscal year, to show net profits in the aggregate and per share after Depreciation, Depletion, Income Taxes and Interest, estimating the proportionate amount of these items as accurately as may be if not finally determined at date of publication.

Not itself, and not to permit any subsidiary, directly or indirectly controlled, to take up as Income stock dividends received at an amount greater than that charged against Earnings, Earned Sur-

(Testimony of M. J. Curry.)

plus or both of them by the issuing Company in relation thereto.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of New York, south of Chambers Street, other than its transfer office or agency in said city, where all listed securities shall be registered. If its transfer books should be permanently closed, to continue to split up certificates of listed stock into smaller denominations in the same name so long as such stock shall be retained upon its list by the New York Stock Exchange. If its transfer office or agency should be or should become located north of Chambers Street, to arrange, at its own cost and expense that its registry office will receive and re-deliver all securities deposited at such registry office for the purpose of transfer.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to add to the number of its transfer agencies, nor to make any change of a transfer agency or of a

(Testimony of M. J. Curry.)

trustee of its bonds or other securities without prior notice to the Committee on Stock List, and not to make any change in its listed securities, nor to add to the number of the registrars of its stock, nor to change a registrar of its stock, without the prior approval of the Committee on Stock List; nor to select an officer or director of the company as a trustee of its mortgages or other listed securities, unless such officer or director be a co-trustee for an issue having a corporate trustee.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner, of any rights to subscribe to, or to be allotted, its securities, or of any other rights or benefits pertaining to ownership in its securities, and to afford the holders of its listed securities a proper period within which to record their interests and to exercise their rights, and to issue all such rights in form approved by the Stock Exchange and to make the same transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To make application to the Stock Exchange for the listing of additional amounts of listed securities sufficiently prior to the issuance thereof to permit action in due course upon such application.

To forward to the Stock Exchange copies of all notices mailed to stockholders looking toward Charter amendments, and to file with the Stock Exchange a certified copy of amended Charter, or Resolutions of Directors in the nature of amendments, as soon

(Testimony of M. J. Curry.)

as such amendments or resolutions have become effective.

To notify the Stock Exchange of the change or removal, to a substantial extent, of collateral deposited under any of its mortgage or trust indentures under which listed securities are outstanding.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

To furnish the New York Stock Exchange, on demand, such reasonable information concerning the company as may be required.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 25, 1931 are: Arthur Curtiss James, Thomas M. Schumacher, Arthur W. Loasby and Winthrop W. Aldrich, of New York, N. Y.; Frank E. Sullivan, William Fries, J. G. Hooper, Scott F. Ennis, Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin and F. M. Angelotti, of San Francisco, California; John L. Nagle, of Sacramento, California; Charles Elsey of Oakland, California; Frederic E. Williamson and James E. Gorman, of Chicago, Illinois; L. W. Baldwin, of

(Testimony of M. J. Curry.)

St. Louis, Missouri; and C. W. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, Arthur W. Loasby, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and H. M. Adams, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James, Chairman of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Executive Vice-President, Charles Elsey; Vice-Presidents, E. W. Mason, J. F. Hogan and M. J. Curry; Secretary, W. G. Bruen; Treasurer, E. C. Bates; Assistant Secretary and Assistant Treasurer, M. J. Curry; Assistant Secretary, Thomas J. Byrne.

The bonds are interchangeable as to denomination and may be transferred and registered at The Chase National Bank of the City of New York, 11 Broad Street, New York, N. Y.

The Agents for the payment of interest are The Chase National Bank of the City of New York and Crocker First Federal Trust Company of San Francisco, California.

The place for the payment of the principal is at the office of The Chase National Bank of the City of New York.

THE WESTERN PACIFIC
RAILROAD COMPANY,

By M. J. CURRY,

Vice-President.

(Testimony of M. J. Curry.)

This Committee recommends that the above-mentioned \$572,800 First Mortgage Five Per Cent. Gold Bonds, Series A, due March 1, 1946, included in numbers M-37976 to M-38547 for \$1,000 each, D-1104 for \$500, and C-5395 to C-5397 for \$100 each (and registered bonds issued in exchange for coupon bonds); be added to the list on official notice of issuance for sale and distribution, in accordance with the terms of this application, making the total amount authorized to be listed \$39,302,800.

FRANK ALTSCHUL,

Chairman.

Adopted by the Governing Committee, August 6, 1930.

ASHBEL GREEN,

Secretary.

[Endorsed]: United States District Court, No. 26951. Western Pac. R. R. Co. v. Irving Trust Co. Exhibit No. 10. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: And the statement of September 30, 1930, as Irving Trust Company Exhibit 11. (The document was marked "Irving Trust Company's Exhibit 11".)

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO. 11

Francis E. Fitch (Inc.), 138 Pearl St., New York.

A-9601

**COMMITTEE ON STOCK LIST
NEW YORK STOCK EXCHANGE**

The Western Pacific Railroad Company

(Organized under the laws of California)

(Controlled by stock ownership by The Western
Pacific Railroad Corporation of Delaware)

First Mortgage Five Per Cent. Gold Bonds, Series
A, Due March 1, 1946

Additional listing, Series A Bonds:

Amount applied for \$ 5,000,000

Authorized First Mortgage Bonds 50,000,000

Amount issued:

Series A, 5% Bonds 44,302,800

Series B, 6% Bonds 3,000,000*

Total listing applied for:

Series A 44,302,800

This additional issue:

Indenture authorized by stockhold-
ers

July 13, 1916

Authorized by Board of Directors.....

July 29, 1930

Approved by Interstate Commerce

Commission by its order (I. C. C.

Finance Docket No. 8414).....

Aug. 21, 1930

No other authority necessary.

*All this issue surrendered for cancellation or re-
deemed as of September 1, 1927.

CAPITAL SECURITIES

		Number of shares			
		Authorized by charter	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
STOCKS					
Classes:	Par value				
Preferred	\$100	400,000	283,000	None	283,000
Common	100	600,000	475,000	None	475,000
BONDS					
	Interest Rate	Amount authorized	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Mortgage Bonds:					
First Mortgage, due Mar. 1, 1946:					
Series "A"	5%	\$50,000,000*	\$44,302,800	\$39,302,800	\$43,697,100
Series "B"	6%		3,000,000	3,000,000	None
Equipment Trust Obligations:					
Titles and dates of maturity:					
†Equip. Trust. Ctfs.	5½%	5,600,000	5,600,000	None	2,975,000
††Equip. Tr. Ctfs.					
(Ser. "C")	5½%	3,105,000	3,105,000	None	1,863,000
••Equip. Tr. Ctfs.					
(Ser. "D")	5%	1,095,000	1,095,000	None	1,022,000

*Total amount of First Mortgage Bonds authorized under Mortgage.

†Certificates in amount of \$375,000 payable March 1st each year from 1924 to 1937, inclusive, and \$350,000 March 1, 1938.

††Certificates in amount of \$207,000 payable December 1st of each year from 1924 to 1938, inclusive.

••Certificates in amount of \$73,000 payable November 1st of each year from 1929 to 1943, inclusive.

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A. C. James Co. et al. vs.

(Testimony of M. J. Curry.)

(Testimony of M. J. Curry.)

New York, September 30, 1930.

Referring to its previous application, especially to A-9504, dated July 1, 1930, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of \$5,000,000 additional (of a total authorized issue of \$50,000,000) of its First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M-38551 to M-43550 both inclusive, for \$1,000 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of sale and distribution, making the total amount of Series A Bonds issued and applied for \$44,302,800.

Authority

The issuance of said \$5,000,000 Series A Bonds of the Railroad Company, covered by this application was authorized by resolutions of the Board of Directors of the Railroad Company adopted July 29, 1930, and their authentication was authorized by a resolution adopted by the Executive Committee on September 24, 1930. No action by the stockholders of the Railroad Company is required by the provisions of the First Mortgage of the Railroad Company, dated June 26, 1916, hereinafter mentioned, or by any laws or regulations applicable to the issuance and sale of any bonds secured by said First Mortgage. The issuance and sale of said \$5,000,000

(Testimony of M. J. Curry.)

Series A Bonds at not less than 97½% of their face amount and acerued interest and for the purposes hereinafter stated was approved by order of the Interstate Commerce Commission, dated August 21, 1930, in Finance Docket No. 8414. No further authority is required. The Railroad Company has sold and delivered said bonds on September 24, 1930, for cash at the price of 97½% of their face ambunt, together with accrued interest thereon, and the proceeds have been applied to the purposes for which the bonds were issued.

Opinion of Counsel

The opinion of counsel as to the legality and validity of the issue was rendered by Mr. John B. Marsh, a member of the firm of Taylor, Blanc, Capron & Marsh, 43 Exchange Place, New York, N. Y., Mr. Carl Taylor, of that firm, being counsel to the Board of Directors of the Railroad Company.

Purpose of Issue

The purpose of the issue of said bonds was to provide proceeds to be applied to the reimbursement of the Railroad Company for expenditures for its own capital purposes and for expenditures on account of capital purposes of Sacramento Northern Railway, a subsidiary of Railroad Company, within the meaning of that term as defined in said First Mortgage; all of such expenditures having been of a character with respect to which bonds may be issued

(Testimony of M. J. Curry.)

and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage, and having been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of August 21, 1930, was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company of San Francisco, California), and Henry E. Cooper (18 Pine Street, New York City), Trustees. The bonds covered by this application are an additional issue of Series A Bonds of \$5,000,000 principal amount, all bearing interest at the rate of five per cent per annum, dated June 26, 1916, and maturing March 1, 1946.

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental

(Testimony of M. J. Curry.)

charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, territory, municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The bonds are in coupon form of the denominations of \$1,000 and \$500 and \$100, and are registerable as to principal only. Coupon bonds for \$1,000 are interchangeable with registered bonds of the denominations of \$1,000, \$5,000 and \$10,000 or multiples of \$10,000. Coupon bonds for \$1,000, \$500 and \$100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding \$1 for each new bond issued upon such exchange or transfer.

(Testimony of M. J. Curry.)

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of \$50,000 on January 1st of each year, commencing with the year 1919. Series A Bonds are redeemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual interest payment date at par and accrued interest on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of

(Testimony of M. J. Curry.)

bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in the Mort-

(Testimony of M. J. Curry.)

gage contained, continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Additional Bonds

The mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars, for the issuance of additional bonds to pay, or reimburse the Railroad Company for, the cost of the construction or purchase of extensions to or additional lines of railroad and for the betterment, improvement and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies and subject to the lien of the mortgage, or securities representing the same, at the rate of one thousand dollars principal amount of bonds for

(Testimony of M. J. Curry.)

each one thousand dollars of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Railroad Company for the purposes above stated to the extent of the net proceeds of each one thousand dollars principal amount of bonds so sold for each one thousand dollars principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount; either upon surrender of the outstanding series for cancellation or upon redemption thereof. The mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed, upon proper proof and satisfactory indemnity.

Changes in Capitalization

Since December 31, 1929 (the date as of which the consolidated balance sheet contained in said previous application A-9504 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except:

- First: The issuance of the \$572,800 of Series A 5% Bonds covered by said application A-9405, and
- Second: The purchase of \$50,000 face amount

(Testimony of M. J. Curry.)

of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased \$655,700); and

Third: The retirement of \$375,000 (face amount) of its 5½% Equipment Trust Certificates, Series "B";

Fourth: The issuance of the \$5,000,000. of Series A 5% Bonds, listing of which is herein applied for.

Properties

The properties of the Railroad Company are described in the original application for listing of Series A Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925; A-7277, dated September 30, 1926; A-7722, dated October 31, 1927; A-8696, dated May 16, 1929; and A-9504, dated July 1, 1930.

Since December 31, 1929, the following important changes in mileage have occurred.

Completion of 3.68 miles additional main line, yard, industry and side tracks the operation of which commenced on various dates between January 1, 1930 and June 30, 1930.

Completion of 10 miles additional branch line, side and spur tracks, the operation of which commenced on various dates between January 1, 1930 and June 30, 1930.

(Testimony of M. J. Curry.)

Acquisition of joint interest with other carriers in .26 miles of industry tracks, operation of which commenced on various dates between January 1, 1930 and June 30, 1930

Since December 31, 1928, the Railroad Company has made the following changes in equipment:

Additions:

Construction and maintenance equipment:	
Water cars	9
Flat cars for gopher shovels	2
Total additions	11

Retirements:

Locomotives—Freight	2
Freight train cars destroyed and converted:	
Box	1
Refrigerator	1
Construction and maintenance equipment:	
Steam shovel	1
Total deductions	5

Net total units added January 1, 1930 to June 30, 1930 6

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800, A-7277, A-7722, A-8696 and A-9504 for a description of the property subject to the lien of the Mortgage prior to January 1, 1930. The property on which the Mortgage constitutes a first lien includes the following:

(Testimony of M. J. Curry.)

Mileage:	Miles
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	125.08
Second main track	2.73
Yard tracks and sidings, etc.	316.52
Total track miles	1,370.74

Equipment:	
Locomotives	146
Passenger cars	13
Freight cars	5,879
Service cars	404
Floating equipment	6
Total	6,448

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series "B," Series "C" and Series "D," as follows:

Locomotives	21
Passenger cars	48
Freight cars	3,589
Service cars	1

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and The Denver and Rio Grande Western Railroad Company.

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company.

(Testimony of M. J. Curry.)

10,000 shares of the Capital Stock (entire issue of Sacramento Northern Railway, operating 258.98 miles of main line of railroad in California.

\$1,372,733.95 Face amount Promissory Note of Sacramento Northern Railway payable to The Western Pacific Railroad Company dated December 29, 1928 due March 1, 1943 with interest at rate of $5\frac{3}{4}\%$ per annum.

3,213,475.35 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.

Deposited cash in the hands of Mortgage Trustees, as of June 30, 1930—\$45,781.85.

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the First Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the First Mortgage, additional lines of railroad, branches and extensions, equipment and securities.

From January 1, 1930 to June 30, 1930, inclusive, the Railroad Company has expended for road and equipment (including the above described equipment) the following amounts.

Road and structures and general expenses.....	\$889,198.90
Equipment	71,673.70
Total	<u>\$960,872.60</u>

(Testimony of M. J. Curry.)

Capital Stock

All of the issued and outstanding Capital Stock, consisting of \$47,500,000 par value of Common Stock and \$28,300,000 par value of Preferred Stock, except Directors' qualifying shares of Common Stock, is held by The Western Pacific Railroad Corporation, a Delaware corporation. \$24,200,000 of the authorized Capital Stock of the Company, consisting of \$12,500,000 of Common Stock and \$11,700,000 of Preferred Stock is not yet issued or outstanding.

Dividends

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	\$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927	1½%	412,500
1928	—	None
1929	—	None
1930	—	None

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	\$2,374,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

(Testimony of M. J. Curry.)

Financial Statements

Certified by D. C. DeGraff, General Auditor of the Company

CAPITAL STOCK OF SUBSIDIARY COMPANIES OUTSTANDING
AND AMOUNT OWNED BY THE WESTERN
PACIFIC RAILROAD COMPANY

Issuing Company	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Tidewater Southern Railway Company	\$1,176,782.00	97.55%	\$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Development Co.	400,500.00	100%	400,500.00
Western Pacific California Rail- road Company (subscribed but not issued)	27,500.00	100%	27,500.00

OWNED BY SACRAMENTO NORTHERN RAILWAY

	Par value Capital Stock outstanding	Percentage owned by Sacramento Northern Railway	Par value owned by Sacramento Northern Railway
West Side Railroad	\$35,000.00	100%	\$35,000.00

OWNED BY STANDARD REALTY & DEVELOPMENT COMPANY

	Par value Capital Stock outstanding	Percentage owned by S. R. & Dev. Co.	Par value owned by S. R. & Dev. Co.
Tidewater Southern Railway Company	\$1,176,782.00	0.24%	\$2,783.00

(Testimony of M. J. Curry.)

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS
OF AFFILIATED COMPANIES AS OF JUNE 30, 1930

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Co.	\$175,439.78	\$400,500.00	\$225,060.22
Tidewater Southern Ry. Company	1,223,848.94	1,147,968.00	*75,880.94
First Mortgage Bonds:			
Sacramento Northern R.R.	3,975,456.13	5,213,475.35	1,238,019.22
Total	\$5,374,744.85	\$6,761,943.35	\$1,387,198.50
Sacramento Northern Railway:			
Capital Stock:			
West Side Railroad	50,000.00	35,000.00	*15,000.00
Standard Realty & Development Co.:			
Capital Stock:			
Tidewater Southern Ry. Company	2,073.00	2,783.00	*710.00
Grand total	\$5,426,817.85	\$6,799,726.35	\$1,372,908.50

*Denotes italic figures.

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY
COMPANIES STATEMENT OF FUNDED DEBT AS OF JUNE
30, 1930.The Western Pacific Railroad Company, First Mortgage
Gold Bonds maturing March 1, 1946:

Issued June 26, 1916, Series "A", 5%	\$19,570,300.00
Issued May 31, 1921, Series "A", 5%	4,078,000.00
Issued April 24, 1925, Series "A", 5%	3,926,000.00
Issued December 1 and 31, 1926, Series "A", 5%	2,600,000.00
Issued September 1 and October 18, 1927, Series "A", 5%	2,950,000.00
Issued April 26, 1929, Series "A", 5%	5,000,000.00
Issued April 23, 1930, Series "A", 5%	572,800.00
Total amount outstanding June 30, 1930	\$38,697,100.00

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "B":

Total amount issued February 21, 1923..... \$5,600,000.00

Par value maturing serially on the first day of March in each year from 1924 to 1937, inclusive.....

375,000.00

Par value maturing on March 1, 1938.....

350,000.00

Total amount outstanding June 30, 1930.....

2,975,000.00

The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "C":

Total amount issued March 10, 1924..... \$3,105,000.00

Par value maturing serially on the first day of December in each year from 1924 to 1938, inclusive.....

207,000.00

Total amount outstanding June 30, 1930.....

1,863,000.00

The Western Pacific Railroad Company 5% Equipment Trust Certificates, Series "D":

Total amount issued June 3, 1929..... \$1,095,000.00

Par value maturing serially on the first day of November in each year from 1929 to 1943, inclusive.....

73,000.00

Total amount outstanding June 30, 1930.....

1,022,000.00

Tidewater Southern Railway Company, First Mortgage Thirty-year Five per Cent. Gold Bonds, maturing April 15, 1942, issued April 15, 1912:

Total amount outstanding June 30, 1930.....

169,000.00

Sacramento Northern Railroad, First Mortgage Twenty-Year Five per Cent. Gold Bonds, issued July 1, 1918, and maturing July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary)

(Testimony of M. J. Curry.)

of Railroad Company), the successor in ownership of all the property of the Sacramento Northern Railroad:

Total amount outstanding June 30, 1930 \$5,224,373.14

Less amount owned by The Western Pacific Railroad Company and pledged under its said First Mortgage 5,213,475.35

10,897.79

Amount of note of Bisbee Investment Company dated January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station, property of Sacramento Northern Railway in the City of Sacramento which property was acquired by said Railway subject to said mortgage, which must be paid by Sacramento Northern Railway, outstanding on June 30, 1930

60,000.00

CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1929, AND SIX MONTHS ENDED JUNE 30, 1930

	Year ended Dec. 31, 1929	Six months ended June 30, 1930
Freight revenue	\$16,358,102.72	\$6,272,731.30
Passenger revenue	2,187,700.11	865,556.17
Mail and express revenue	560,197.38	257,776.26
Miscellaneous revenue	990,618.68	307,625.73
Total revenue	\$20,096,618.89	\$7,703,689.46
Expenses operating	\$16,732,912.77	\$8,112,051.28
Taxes	1,467,522.66	680,561.91
Uncollectible railway revenues	1,325.25	226.26
Operating income	\$1,894,858.21	*\$1,089,149.99

(Testimony of M. J. Curry.)

Other Income:

Rental of property.....	\$660,107.01	\$325,923.81
Hire of equipment, receipts.....	1,418,910.88	546,815.88
Dividend income.....	185.00	
Income from funded securities.....	22,715.42	11,637.50
Miscellaneous income.....	328.67	877.62
Income from unfunded securities and accounts.....	96,683.08	27,996.80
Gross income.....	\$4,093,788.27	*\$175,898.38

Income deductions:

Interest on funded debt, First Mort- gage Bonds.....	1,843,664.61	964,854.38
Interest on funded debt, Equipment Notes.....	322,826.61	162,032.50
Interest on funded debt, advances.....	297,926.30	149,146.96
Rental of leased property.....	232,674.53	136,020.56
Hire of equipment, payments.....	1,171,651.44	482,462.87
Miscellaneous deductions.....	79,980.86	138,200.25
Amortization of discount on funded debt.....	130,972.48	66,699.07
Total deductions.....	\$4,079,696.83	\$2,099,416.59
Net income.....	\$14,091.44	†*\$2,275,314.97

†Corresponding figure for the six months June 30, 1929, was \$656,914.57.

*Denotes red figures.

ANALYSIS OF SURPLUS ACCOUNT CHANGES—DECEMBER 31,
1928, TO JUNE 30, 1930

	Year ending Dec. 31, 1929	Six months ending June 30, 1930	Consolidated total
Net income.....	\$14,091.44	*\$2,275,314.97	*\$2,261,223.53
Add: Net miscellaneous credits.....	66,187.10	3,452.28	69,639.38
Total.....	\$80,278.54	*\$2,271,862.69	*\$2,191,584.15

(Testimony of M. J. Curry.)

Deduct:

Net miscellaneous debits	30,099.27	10,529.83	40,629.10
Dividends on Preferred Stock			
Total deductions	\$30,099.27	\$10,529.83	\$40,629.10
Surplus—Increase	50,179.27	*2,282,392.52	*2,232,213.25
Surplus credit balance—June 30, 1930			\$4,936,735.93
Surplus credit balance—December 31, 1928			7,168,949.18
Increase			*2,232,213.25

CONSOLIDATED GENERAL BALANCE SHEET DECEMBER 31, 1929, AND JUNE 30, 1930

ASSETS

Dec. 31, 1929

June 30, 1930

Investments:

Investment in railroad and equipment	\$137,832,688.69	\$139,576,389.68
Investment in real estate and improvements	1,085,363.12	1,090,302.00
Sinking funds	50,235.92	8,244.42
Deposits in lieu of mortgaged property sold	4,850.00	5,500.00
Miscellaneous physical property	1,915,076.95	2,451,646.19
Other investments	1,544,750.30	1,653,865.26
Total investments	\$142,432,964.98	\$144,785,947.55

Current assets:

Cash	1,596,289.57	1,142,337.43
Deposits of mortgage trust funds	40,841.46	40,906.85
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	156,864.60	154,368.93
Loans and notes receivable	9,709.70	9,592.70
Traffic and car service balances receivable	523,332.58	395,739.19

(Testimony of M. J. Curry.)

	Dec. 31, 1929	June 30, 1930
Net balances receivable from agents and conductors	222,549.91	169,333.20
Miscellaneous accounts receivable	1,289,034.69	1,114,472.86
Material and supplies	3,129,323.72	2,974,180.20
Interest and dividends receivable	11,330.25	11,362.39
Other current assets	89.74	89.74
Total current assets	\$7,026,062.14	\$6,059,079.41
Deferred assets:		
Working fund advances	5,665.59	4,788.72
Total deferred assets	\$5,665.59	\$4,788.72
Unadjusted debits:		
Rents and insurance premiums paid in advance	49,302.29	26,925.31
Discount on funded debt	1,958,634.10	1,895,222.61
Other unadjusted debits	733,376.05	798,803.96
Total unadjusted debits	\$2,741,312.44	\$2,720,951.88
Total assets	\$152,206,005.15	\$153,570,767.56
Excess of par value over book value of capital stock and bonds of subsidiary companies	1,372,741.50	1,372,908.50
	\$150,833,263.65	\$152,197,859.06

LIABILITIES

Capital Stock:

Common	\$47,526,699.00	\$47,526,031.00
Preferred	28,300,000.00	28,300,000.00
Premium on Capital Stock	498,238.00	498,238.00
Total stock	\$76,324,937.00	\$76,324,269.00

(Testimony of M. J. Curry.)

	Dec. 31, 1929	June 30, 1930
Long term debt:		
Funded debt (First Mortgage Gold Bonds)	\$38,414,197.79	\$38,936,997.79
Fund debt (Equipment Trust Certificates)	6,235,000.00	5,860,000.00
Total long term debt	\$44,649,197.79	\$44,796,997.79
Debt to affiliated companies:		
Open accounts	\$4,838,739.75	\$7,847,502.84
Total debt to affiliated companies	\$4,838,739.75	\$7,847,502.84
Current liabilities:		
Loans and notes payable	\$1,014,647.24	\$986,260.00
Traffic and car service balances payable	629,875.95	457,324.43
Audited accounts and wages payable	1,309,584.40	1,509,561.11
Miscellaneous accounts payable	252,739.51	73,721.73
Interest matured unpaid	15,077.72	12,582.05
Funded debt matured unpaid	11,100.00	11,100.00
Unmatured interest accrued	720,035.60	712,798.14
Unmatured rents accrued	4,804.16	14,526.00
Other current liabilities	82,280.45	93,415.12
Total current liabilities	\$4,040,145.09	\$3,871,288.58
Deferred liabilities:		
Other deferred liabilities	\$16,483.28	\$31,838.67
Total deferred liabilities	\$16,483.28	\$31,838.67
Unadjusted credits:		
Tax liability	\$220,629.25	\$324,845.48
Accrued depreciation—Equipment	6,070,695.76	6,501,081.91
Other unadjusted credits	281,750.49	391,742.07
Surplus—Investment, equipment and other property purchased	7,171,556.79	7,171,556.79
Total unadjusted credits	\$13,744,632.29	\$14,389,226.25

(Testimony of M. J. Curry.)

Surplus:

Additions to property through income and surplus	\$6,758,472.14	\$7,157,105.51
Funded debt retired through income and surplus	549,884.98	599,313.98
Sinking fund reserves	353,651.42	324,657.42
Profit and loss balance	*442,880.09	*3,144,340.98
<hr/>		
Total surplus	\$7,219,128.45	\$4,936,735.93
<hr/>		
Total liabilities	\$150,833,263.65	\$152,197,859.06
<hr/>		

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company, in consideration of the listing of the securities covered by this application, agrees with the New York Stock Exchange as follows:

To notify the New York Stock Exchange promptly of any change in the general character or nature of its business.

(Testimony of M. J. Curry.)

To notify the New York Stock Exchange immediately if it or any subsidiary or controlled company should dispose of any property or of any stock interest in any of its subsidiary or controlled companies, when such disposal would impair or materially affect its financial position or the nature or extent of its operations as theretofore conducted.

Subject to Interstate Commerce Commission regulations, to publish periodical statements of earnings, as agreed upon with the Committee.

To publish at least once in each year and submit to stockholders at least fifteen days in advance of the annual meeting of the corporation, a Balance Sheet, an Income Statement for the last fiscal year and a Surplus statement of the applicant company as a separate corporate entity and of each corporation in which it holds directly or indirectly a majority of the voting stock; or, in lieu thereof, eliminating all intercompany transactions:

(a) a similar set of financial statements fully consolidated as to the applicant company and all corporations in which it owns directly or indirectly a majority of the voting stock, or

(b) a similar set of financial statements consolidated as to the applicant company and specifically named or described subsidiaries, with separate similar financial statements for each unconsolidated corporation in which the applicant company holds directly or indirectly a majority of the voting stock.

(Testimony of M. J. Curry.)

Such statements shall disclose fully the nature and extent of the interest of the applicant company in the corporations whose unconsolidated financial statements are furnished, and also the existence of any default in interest, cumulative dividend requirements or sinking fund or redemption fund requirements of any of the corporations whose accounts are thus consolidated or separately shown.

Subject to Interstate Commerce Commission's regulations, to publish all future annual financial statements of any character, in the form contained in the listing application and, in the publication of reports of earnings for any period of less than a fiscal year, to show net profits in the aggregate and per share after Depreciation, Depletion, Income Taxes and Interest, estimating the proportionate amount of these items as accurately as may be if not finally determined at date of publication.

Not itself, and not to permit any subsidiary, directly or indirectly controlled, to take up as Income stock dividends received at an amount greater than that charged against Earnings, Earned Surplus or both of them by the issuing Company in relation thereto.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a reg-

(Testimony of M. J. Curry.)

istry office in the Borough of Manhattan, City of New York, south of Chambers Street, other than its transfer office or agency in said city, where all listed securities shall be registered. If its transfer books should be permanently closed, to continue to split up certificates of listed stock into smaller denominations in the same name so long as such stock shall be retained upon its list by the New York Stock Exchange. If its transfer office or agency should be or should become located north of Chambers Street, to arrange, at its own cost and expense that its registry office will receive and re-deliver all securities deposited at such registry office for the purpose of transfer.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to add to the number of its transfer agencies, nor to make any change of a transfer agency or of a trustee of its bonds or other securities without prior notice to the Committee on Stock List, and not to make any change in its listed securities, nor to add to the number of the registrars of its stock, nor to change a registrar of its stock, without the prior approval of the Committee on Stock List; nor to select an officer or director of the company as a trustee of its mortgages or other listed securities, unless such officer or director be a co-trustee for an issue having a corporate trustee.

(Testimony of M. J. Curry.)

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted, its securities, or of any other rights or benefits pertaining to ownership in its securities, and to afford the holders of its listed securities a proper period within which to record their interests and to exercise their rights, and to issue all such rights in form approved by the Stock Exchange and to make the same transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To make application to the Stock Exchange for the listing of additional amounts of listed securities sufficiently prior to the issuance thereof to permit action in due course upon such application.

To forward to the Stock Exchange copies of all notices mailed to stockholders looking toward Charter amendments, and to file with the Stock Exchange a certified copy of amended Charter, or Resolutions of Directors in the nature of amendments, as soon as such amendments or resolutions have become effective.

To notify the Stock Exchange of the change or removal, to a substantial extent, of collateral deposited under any of its mortgage or trust indentures under which listed securities are outstanding.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

To furnish the New York Stock Exchange, on demand, such reasonable information concerning the company as may be required.

(Testimony of M. J. Carry.)

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stock holders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 25, 1931, are: Arthur Curtiss James, Thomas M. Schumacher, Arthur W. Loasby and Winthrop W. Aldrich, of New York, N. Y.; Frank E. Sullivan, William Fries, J. G. Hooper, Scott F. Farris, Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin and F. M. Angelotti of San Francisco, Calif.; John L. Nagle, of Sacramento, Calif.; Charles Elsey, of Oakland, Calif.; Frederick E. Williamson and James E. Gorman, of Chicago, Ill.; L. W. Baldwin, of St. Louis, Mo.; and C. W. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, Arthur W. Loasby, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and H. M. Adams, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James; Chairman of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Executive Vice-

(Testimony of M. J. Curry.)

President, Charles Elsey; Vice-Presidents, E. W. Mason, J. F. Hogan and M. J. Curry; Secretary, W. G. Bruen; Treasurer, E. C. Bates; Assistant Secretary and Assistant Treasurer, M. J. Curry; Assistant Secretary, Thomas J. Byrne.

The bonds are interchangeable as to denomination and may be transferred and registered at The Chase National Bank of the City of New York, 11 Broad Street, New York, N. Y.

The Agents for the payment of interest are The Chase National Bank of the City of New York and Crocker First Federal Trust Company of San Francisco, California.

The place for the payment of the principal is at the office of The Chase National Bank of the City of New York.

**THE WESTERN PACIFIC
RAILROAD COMPANY**

By M. J. CURRY,

Vice-President.

This Committee recommends that the above-mentioned \$5,000,000 First Mortgage 5% Gold Bonds, Series A, due March 1, 1946, included in numbers M-38551 to M-43550, for \$1,000 each (and coupon bonds of one denomination issued in exchange for coupon bonds of another denomination and registered bonds issued in exchange for coupon bonds) be added to the list on official notice of sale and distribution, in accordance with the terms of this

(Testimony of M. J. Curry.)

application, making the total amount authorized to be listed \$44,302,800.

FRANK ALTSCHUL,

Chairman.

Adopted by the Governing Committee, October 29, 1930.

ASHBEL GREEN,

Secretary.

[Endorsed]: United States District Court. No. 26591 Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 11. Filed 1/22/40. Walter B. Maling, Clerk.

Mr. McCollum: And the statement of February 20, 1931 as Irving Trust Company Exhibit 12.

(The document was marked "Irving Trust Company's Exhibit 12.")

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO: 12

Francis E. Fitch (Inc.), 138 Pearl St., New York
A-9702COMMITTEE ON STOCK LIST
NEW YORK STOCK EXCHANGEThe Western Pacific Railroad Company
(Organized under the laws of California)
(Controlled by stock ownership by The Western
Pacific Railroad Corporation of Delaware)First Mortgage Five per Cent. Gold Bonds,
Series A, Due March 1, 1946

Additional listing, Series A Bonds..... \$5,000,000

Authorized First Mortgage Bonds..... 50,000,000

Amount issued:

Series A, 5% Bonds..... 45,302,800

Series B, 6% Bonds..... 3,000,000*

Total listing applied for:

Series A 49,302,800

This additional issue:

Indenture authorized by stock-

holders July 13, 1916

Authorized by Board of Directors Sept. 2, 1930

Authorized by stockholders..... Sept. 22, 1930

Approved by Interstate Commerce

Commission by its order (I. C. C.

Finance Docket No. 8473)..... Oct. 6, 1930

No other authority necessary.

*All this issue surrendered for cancellation
or redeemed as of September 1, 1927.

CAPITAL SECURITIES

Number of shares

STOCK	Par value	Authorized by charter	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Classes:					
Preferred	\$100	400,000	283,000	None	283,000
Common	100	600,000	475,000	None	475,000
BONDS	Interest Rate	Amount authorized	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Mortgage Bonds:					
First Mortgage, due March 1, 1946:					
Series "A" 5%		\$50,000,000*	\$49,302,800	\$44,302,800	\$44,645,100
Series "B" 6%			3,000,000	3,000,000	None
Equipment Trust Obligations:					
Titles and dates of maturity:					
†Equipment Trust Certificates 5½%		5,600,000	5,600,000	None	2,975,000
†Equipment Trust Certificates (Series "C") 5½%		3,105,000	3,105,000	None	1,656,000
§Equipment Trust Certificates (Series "D") 5%		1,095,000	1,095,000	None	949,000

*Total amount of First Mortgage Bonds under Mortgage.

†Certificates in amount of \$375,000 payable March 1st of each year from 1924 to 1937, inclusive, and \$350,000 March 1, 1938.

‡Certificates in amount of \$207,000 payable December 1st of each year from 1924 to 1938, inclusive.

§Certificates in amount of \$73,000 payable November 1st of each year from 1929 to 1943, inclusive.

(Testimony of M. J. Curry.)

Institutional Bondholders et al.

1497

(Testimony of M. J. Curry.)

New York, February 20, 1931.

Referring to its previous applications, especially to A-9601, dated September 30, 1930, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of \$5,000,000 additional of its First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M-43551 to M-48550 both inclusive, for \$1,000 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of issuance, sale and distribution, making the total amount of Series A Bonds issued or to be issued and for which application is made, \$49,362,800 (of a total authorized issue of \$50,000,000).

Authority

The issuance of said \$5,000,000 Series A Bonds of the Railroad Company covered by this application was authorized by resolutions of the Board of Directors of the Railroad Company adopted September 2, 1930, and their authentication was authorized by a resolution adopted by the Executive Committee on February 11, 1931. The purpose of said issuance (as more fully hereinafter described) is to finance in part the construction and/or acquisition by Railroad Company of its "Northern California Extension," the expenditure in such construction and/or acquisition, amounting to more than \$1,000,000, and therefore, pursuant to sub-

(Testimony of M. J. Curry.)

paragraph Seventh of subdivision D of Section 2 of Article Second of the First Mortgage of Railroad Company, dated June 26, 1916, hereinafter mentioned, a majority in amount of such portion of the Capital Stock of Railroad Company as was present in person or represented by proxy at a meeting of stockholders of Railroad Company called for such purpose, consented to the authentication and delivery of First Mortgage Bonds and/or the payment of deposited cash therefrom with respect to the construction and/or acquisition by Railroad Company of said new line of railroad, its so-called "Northern California Extension," such meeting being held on September 22, 1930, at the principal office of Railroad Company in San Francisco, California; a tally of the ballots cast by all stockholders present at said meeting disclosed that no share of stock had been voted against said consent and that the number of shares of stock voted for said consent was 283,000 shares of Preferred Stock and 474,984 shares of Common Stock of Railroad Company, being more than 99% of all of the Capital Stock of Railroad Company then issued and outstanding. The issuance and sale of said \$5,000,000 Series A Bonds at not less than 97.5% of their face amount and accrued interest, and for the purposes hereinafter stated, was approved by order of the Interstate Commerce Commission dated October 6, 1930 in

(Testimony of M. J. Curry.)

Finance Docket No. 8473. No further authority is required. The Railroad Company has sold and delivered \$1,000,000 of said bonds, on February 11, 1931, for cash at the price of 97.5% of their face amount, together with accrued interest thereon, and the proceeds have been applied to the purposes for which the bonds were issued.

Opinion of Counsel

The opinion of Counsel as to the legality and validity of the issue was rendered by Mr. John B. Marsh, a member of the firm of Taylor, Blanc, Capron & Marsh, 43 Exchange Place, New York, N. Y., Mr. Carl Taylor of that firm being counsel to the Board of Directors of the Railroad Company.

Purpose of Issue

The purpose of the issue of said Bonds is to provide proceeds to finance in part the construction and/or acquisition by Railroad Company of its "Northern California Extension," a new line of railroad, to begin at a point on the existing main line of Railroad Company at or near Keddie, Plumas County, California, and to extend approximately 112 miles in a general northerly direction to a connection at or near Bieber, Lassen County, California, with a line of railroad of Great Northern Railway Company now under construction from Klamath Falls, Oregon, southerly to said Bieber; also including a line of railroad to be jointly acquired and/or constructed and owned by Railroad

(Testimony of M. J. Curry.)

Company and said Great Northern Railway Company extending from a point on the said line of Great Northern Railway Company (now under construction) in the vicinity of Lookout, Modoc County, California, westerly to a connection with the McCloud River Railroad at or near Hambone, Siskiyou County, California, approximately 36 miles in length; liabilities or expenditures on account of such construction and/or acquisition of said new line of railroad being of a character with respect to which bonds may be issued and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage, and having been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of October 6, 1930 was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company of San Francisco, California), and Henry E. Cooper (18 Pine Street, New York City), Trustees. The Bonds covered by this application are an additional issue of Series A Bonds of \$5,000,000 principal amount, all bearing interest at the rate of five per cent. per annum, dated June 26, 1916, and maturing March 1, 1946.

(Testimony of M. J. Curry.)

The principal of the Bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the city and county of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal income tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the Bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any state, territory, municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The Bonds are in coupon form of the denominations of \$1,000 and \$500 and \$100 and are registerable as to principal only. Coupon bonds for \$1,000 are interchangeable with registered bonds of the denominations of \$1,000, \$5,000 and \$10,000 or multiples of \$10,000. Coupon bonds for \$1,000, \$500

(Testimony of M. J. Curry.)

and \$100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and ~~except in case of coupon bonds~~ registered as to principal an additional amount not exceeding \$1 for each new bond issued upon such exchange or transfer.

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of \$50,000 on January 1st of each year, commencing with the year 1919. Series A Bonds are redeemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds, on any semi-annual

(Testimony of M. J. Curry.)

interest payment date at par and accrued interest on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other

(Testimony of M. J. Curry.)

obligations, to the extent specified in Section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the Bonds or in the Mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The Mortgage provides that the holders of a majority in amount of the Bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Additional Bonds

The Mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars, for the issu-

(Testimony of M. J. Curry.)

ance of additional bonds to pay, or reimburse the Railroad Company for, the cost of the construction or purchase of extension to or additional lines of railroad and for the betterment, improvement, and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies, and subject to the lien of the Mortgage, or securities representing the same, at the rate of one thousand dollars principal amount of bonds for each one thousand dollars of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The Mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Railroad Company for the purposes above stated to the extent of the net proceeds of each one thousand dollars principal amount of bonds so sold for each one thousand dollars principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The Mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount, either upon surrender of the outstanding series for cancellation or upon redemption thereof. The Mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed, upon proper proof and satisfactory indemnity.

(Testimony of M. J. Curry.)

Changes in Capitalization

Since June 30, 1930 (the date as of which the consolidated balance sheet contained in said previous application A-9601 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except:

First. The issuance of the \$5,000,000 of Series A 5% Bonds covered by said Application A-9601, and

Second. The purchase of \$52,000 face amount of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased \$707,700); and

Third. The retirement of \$207,000 (face amount) of its 5½% Equipment Trust Certificates, Series "C" and \$73,000 (face amount) of its 5% Equipment Trust Certificates, Series "D."

Fourth. The issuance of \$1,000,000 of the \$5,000,000 of Series A 5% Bonds, listing of which is herein applied for.

Properties

The properties of the Railroad Company are described in the original application for listing of Series A Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925; A-7277, dated September 30, 1926; A-7722, dated October 31, 1927; A-8696, dated May 16, 1929; A-9504, dated July 1, 1930, and A-9601, dated September 30, 1930.

(Testimony of M. J. Curry.)

Since June 30, 1930, the following important changes in mileage have occurred:

Completion of 7.71 miles additional main line, yard, industry and side tracks the operation of which commenced on various dates between July 1, 1930 and December 31, 1930.

Completion of .29 miles additional branch line side and spur tracks, the operation of which commenced on various dates between July 1, 1930 and December 31, 1930.

Acquisition of joint interest with other carriers in .15 miles of industry tracks, operation of which commenced on various dates between July 1, 1930 and December 31, 1930.

Since June 30, 1930, the Railroad Company has made the following changes in equipment:

Additions:

Freight train cars: Flat car.....	1
Total additions.....	1

Retirements:

Freight train cars destroyed and converted:

Box	1
Refrigerator	5
Flat cars.....	3

Construction and maintenance equipment:

Outfit cars.....	4
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Total deductions.....	13
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Net total units retired July 1, 1930, to December 31, 1930	12
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Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800,

(Testimony of M. J. Curry.)

A-7277, A-7722, A-8696, A-9504 and A-9601 for a description of the property subject to the lien of the Mortgage prior to July 1, 1930. The property on which the Mortgage constitutes a first lien includes the following:

Mileage:

	Miles
Main line mileage, San Francisco to Salt Lake City.....	926.41
Branch lines, main track.....	125.08
Second main track.....	2.73
Yard tracks and sidings, etc.....	323.46
Total track miles.....	1,377.68

Equipment:

Locomotives.....	146
Passenger cars.....	13
Freight cars.....	5,877
Service cars.....	400
Floating equipment.....	6
Total.....	6,442

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series "B," Series "C" and Series "D," as follows:

Locomotives.....	21
Passenger cars.....	48
Freight cars.....	3,583
Service cars.....	1

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and The Denver and Rio Grande Western Railroad Company.

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

(Testimony of M. J. Curry.)

- 4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company organized to acquire and hold real estate in connection with the construction of the Railroad Company.
- 10,000 shares of the Capital Stock (entire issue) of Sacramento Northern Railway, operating 258.98 miles of main line of railroad in California.
- \$1,372,733.95 Face amount Promissory Note of Sacramento Northern Railway payable to The Western Pacific Railroad Company dated December 29, 1928, due on or before March 1, 1943, with interest at rate of $5\frac{3}{4}\%$ per annum.
- 1,553,742.77 Face amount Promissory Note of Sacramento Northern Railway payable to The Western Pacific Railroad Company dated September 2, 1930, due on or before March 1, 1945, with interest at rate of $5\frac{1}{4}\%$ per annum.
- 5,213,475.35 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.
- Deposited cash in the hands of Mortgage Trustees, as of December 31, 1930, \$53,697.45.

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the First Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the First Mortgage, additional lines of railroad, branches and extension, equipment and securities.

From July 1, 1930 to December 31, 1930, inclusive, the Railroad Company has expended for road and equipment (including the above described equipment) the following amounts:

(Testimony of M. J. Curry.)

Road and structures and general expenses	\$2,507,136.93
Equipment	50,540.86
Total	\$2,557,677.79

Capital Stock

All of the issued and outstanding Capital Stock, consisting of \$47,500,000 par value of Common Stock and \$28,300,000 par value of Preferred Stock, except Directors' qualifying shares of Common Stock, is held by The Western Pacific Railroad Corporation, a Delaware corporation. \$24,200,000 of the authorized Capital Stock of the Company, consisting of \$12,500,000 of Common Stock and \$11,700,000 of Preferred Stock is not yet issued or outstanding.

Dividends

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	\$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927	11½%	412,500
1928		None
1929		None
1930		None

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	2,375,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

(Testimony of M. J. Curry.)

**The Western Pacific Railroad Company
Financial Statements**

Certified by D. C. DeGraff, General Auditor of the
Company.

Capital Stock of Subsidiary Companies Outstand-
ing and Amount owned by

THE WESTERN PACIFIC RAILROAD COMPANY

Issuing Company	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Tidewater Southern Railway Company	\$1,176,782.00	97.55%	\$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Devel- ment Co.	400,500.00	100%	400,500.00
Western Pacific California Rail- road Company (subscribed but not issued)	27,500.00	100%	27,500.00

SACRAMENTO NORTHERN RAILWAY

	Par value Capital Stock outstanding	Percentage owned by Sacramento Northern Ry.	Par value owned by Sacramento Northern Ry.
West Side Railroad	\$35,000.00	100%	\$35,000.00

STANDARD REALTY & DEVELOPMENT COMPANY

	Par value Capital Stock outstanding	Percentage owned by S. R. & Dev. Co.	Par value owned by S. R. & Dev. Co.
Tidewater Southern Railway Company	\$1,178,782.00	50%	\$5,883.00

(Testimony of M. J. Curry.)

**EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS
OF AFFILIATED COMPANIES AS OF DECEMBER 31, 1930.**

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Company.....	\$175,439.78	\$400,500.00	\$225,060.22
Tidewater Southern Ry. Company	1,223,848.94	1,147,968.00	*75,880.94
First Mortgage Bonds:			
Sacramento Northern R.R.	3,975,456.13	5,213,475.34	1,238,019.22
Total	\$5,374,744.85	\$6,761,943.35	\$1,387,198.50
Sacramento Northern Railway:			
Capital Stock:			
West Side Railroad.....	50,000.00	35,000.00	*15,000.00
Standard Realty & Development Co.:			
Capital Stock:			
Tidewater Southern Ry. Company	4,398.00	3,583.00	1,485.00
Grand total	\$5,429,142.85	\$6,802,826.35	\$1,373,683.50

**THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY
COMPANIES STATEMENT OF FUNDED DEBT AS OF DE-
CEMBER 31, 1930.**

The Western Pacific Railroad Company, First Mortgage	
Gold Bonds, maturing March 1, 1946:	
Issued June 26, 1916, Series A, 5%	\$19,570,300.00
Issued May 31, 1921, Series A, 5%	4,078,000.00
Issued April 24, 1925, Series A, 5%	3,926,000.00
Issued December 1 and 31, 1926, Series A, 5%	2,600,000.00
Issued September 1 and October 18, 1927, Series A, 5%	2,950,000.00
Issued April 26, 1929, Series A, 5%	5,000,000.00
Issued April 23, 1930, Series A, 5%	572,800.00
Issued September 24, 1930, Series A 5%	5,000,000.00
Total amount outstanding December 31, 1930	\$43,697,100.00

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "B":

Total amount issued February 21, 1923 \$5,600,000.00

Par value maturing serially on the first day of March in each year from 1924 to 1937, inclusive 375,000.00

Par value maturing on March 1, 1938 350,000.00

Total amount outstanding December 31, 1930 2,975,000.00

The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "C":

Total amount issued March 10, 1924 \$3,105,000.00

Par value maturing serially on the first day of December in each year from 1924 to 1938, inclusive 207,000.00

Total amount outstanding December 31, 1930 1,656,000.00

The Western Pacific Railroad Company, 5% Equipment Trust Certificates, Series "D":

Total amount issued June 3, 1929 \$1,095,000.00

Par value maturing serially on the first day of November in each year from 1929 to 1943, inclusive 73,000.00

Total amount outstanding December 31, 1930 949,000.00

Tidewater Southern Railway Company, First Mortgage Thirty-Year Five per Cent Gold Bonds, maturing April 15, 1942, issued April 15, 1912:

Total amount outstanding December 31, 1930 135,500.00

Sacramento Northern Railroad, First Mortgage Twenty-Year Five Per Cent Gold Bonds, issued July 1, 1918, and maturing July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary of Railroad Company), the successor in ownership

(Testimony of M. J. Curry.)

of all the property of the Sacramento
Northern Railroad:

Total amount outstanding December 31,
1930

\$5,224,373.14

Less amount owned by The Western Pa-
cific Railroad Company and pledged
under its said First Mortgage

5,213,475.35

\$10,897.79

Amount of note of Bisbee Investment Company dated Jan-
uary 14, 1925, in favor of California Trust and Sav-
ings Bank, maturing in installments due on various
dates up to October 1, 1934, secured by mortgage on
union passenger station, property of Sacramento
Northern Railway in the City of Sacramento, which
property was acquired by said Railway subject to said
mortgage, which must be paid by Sacramento North-
ern Railway, outstanding on December 31, 1930

60,000.00

THE WESTERN PACIFIC RAILROAD COMPANY, AND SUBSIDI-
ARY COMPANIES CONSOLIDATED INCOME ACCOUNT FOR
YEAR ENDED DECEMBER 31, 1929, AND YEAR ENDED DE-
CEMBER 31, 1930.

	Year ended Dec. 31, 1929	Year ended Dec. 31, 1930
Freight revenue	\$16,358,102.72	\$15,451,540.74
Passenger revenue	2,187,700.11	1,797,223.18
Mail and express revenue	560,197.38	477,871.76
Miscellaneous revenue	990,618.68	1,095,901.67
Total revenue	\$20,096,618.89	\$18,822,537.35
Expenses operating	\$16,732,912.47	\$15,831,967.27
Taxes	1,467,522.66	1,278,372.01
Uncollectible railway revenues	1,325.25	450.60
Operating income	\$1,894,858.21	\$1,711,747.47

(Testimony of M. J. Curry.)

Other income:

Rental of property	\$660,107.01	\$642,360.67
Hire of equipment, receipts	1,418,910.88	1,000,303.20
Dividend income	185.00	220.00
Income from funded securities	22,715.42	23,525.77
Income from unfunded securities and accounts	96,683.08	65,857.93
Miscellaneous income	328.67	40,164.05
Gross income	\$4,093,788.27	\$3,484,179.99

Income deductions:

Interest on funded debt, First Mortgage Bonds	\$1,843,664.61	\$1,977,897.77
Interest on funded debt, Equipment Notes	322,826.61	319,070.41
Interest on funded debt advances	297,926.30	367,178.11
Rental of leased property	232,674.53	266,341.95
Hire of equipment, payments	1,171,651.44	1,380,941.99
Miscellaneous deductions	79,980.86	163,397.75
Amortization of discount on funded debt	130,972.48	135,984.32
Total deductions	\$4,079,696.83	\$4,610,812.30
Net income	\$14,091.44	*\$1,126,633.21

ANALYSIS OF SURPLUS ACCOUNT CHANGES—DECEMBER 31, 1928, TO DECEMBER 31, 1930

	Year ending Dec. 31, 1929	Year ending Dec. 31, 1930	Consolidated total
Net income	\$14,091.44	*\$1,126,633.21	*\$1,112,541.77
Add: Net miscellaneous credits	66,187.10	39,472.62	105,659.72
Total	\$80,278.54	*\$1,087,160.59	*\$1,006,882.05

(Testimony of M. J. Curry.)

Deduct:

Net miscellaneous debits	\$30,099.27	\$38,179.42	\$68,278.69
Dividends on Preferred Stock			
Total deductions	\$30,099.27	\$38,179.42	\$68,278.69
Surplus—Increase	\$50,179.27	*\$1,125,340.01	*\$1,075,160.74
Surplus credit balance, December 31, 1930	\$6,093,788.44		
Surplus credit balance, December 31, 1928	7,168,949.18		
Increase		*\$1,075,160.74	

CONSOLIDATED GENERAL BALANCE SHEET, DECEMBER 31, 1929, AND DECEMBER 31, 1930

ASSETS

	Dec. 31, 1929	Dec. 31, 1930
Investments:		
Investment in railroad and equipment	\$137,832,688.69	\$142,315,020.95
Investment in real estate and improvements	1,085,363.12	1,088,677.84
Sinking funds	50,235.92	50,938.14
Deposits in lieu of mortgaged property sold	4,850.00	13,515.60
Miscellaneous physical property	1,915,076.95	2,522,173.43
Other investments	1,544,750.30	1,668,128.47
Total Investments	\$142,432,964.98	\$147,658,454.43
Current assets:		
Cash	\$1,596,289.57	\$1,048,205.94
Deposits of mortgage trust funds	40,841.46	40,906.85
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	156,864.60	154,135.76
Loans and notes receivable	9,709.70	5,660.15

(Testimony of M. J. Curry.)

	Dec. 31, 1929	Dec. 31, 1930
Traffic and car service balances receivable	523,332.58	406,286.08
Net balances receivable from agents and conductors	222,549.91	128,835.33
Miscellaneous accounts receivable	1,289,034.69	1,226,287.72
Material and supplies	3,129,323.72	3,128,395.78
Interest and dividends receivable	11,330.25	9,424.71
Other current assets	89.74	89.74
Total current assets	\$7,026,062.14	\$6,194,923.98
Deferred assets: Working fund advances	\$5,665.59	\$4,906.81
Total deferred assets	\$5,665.59	\$4,906.81
Unadjusted debits:		
Rents and insurance premiums paid in advance	\$49,302.29	\$36,660.55
Discount on funded debt	1,958,634.10	1,961,148.49
Other unadjusted debits	733,376.05	862,956.55
Total unadjusted debits	\$2,741,312.44	\$2,860,765.59
Total assets	\$152,206,005.15	\$156,719,050.81
Excess of par value over book value of capital stock and bonds of subsidiary companies	\$1,372,741.50	\$1,373,683.50
	\$150,833,263.65	\$155,345,367.31

LIABILITIES

	Dec. 31, 1929	Dec. 31, 1930
Capital Stock:		
Common	\$47,526,699.00	\$47,522,931.00
Preferred	28,300,000.00	28,300,000.00
Premium on Capital Stock	498,238.00	498,238.00
Total stock	\$76,324,937.00	\$76,321,169.00

(Testimony of M. J. Curry.)

	Dec. 31, 1929	Dec. 31, 1930
Long term debt:		
Funded debt (First Mortgage Gold Bonds)	\$38,414,197.79	\$43,903,497.79
Funded debt (Equipment Trust Certificates)	6,235,000.00	5,580,000.00
Total long term debt	\$44,649,197.79	\$49,483,497.79
Debt to affiliated companies:		
Open accounts	\$4,838,739.75	\$4,387,007.87
Total debt to affiliated companies	\$4,838,739.75	\$4,387,007.87
Current liabilities:		
Loans and notes payable	\$1,014,647.24	\$998,235.00
Traffic and car service balances payable	629,875.95	384,268.34
Audited accounts and wages payable	1,309,584.46	1,606,490.82
Miscellaneous accounts payable	252,739.51	\$15,187.86
Interest matured unpaid	15,077.72	12,348.88
Funded debt matured unpaid	11,100.00	11,100.00
Unmatured interest accrued	720,035.60	786,908.51
Unmatured rents accrued	4,804.16	4,666.66
Other current liabilities	82,280.45	76,341.42
Total current liabilities	\$4,040,145.09	\$4,195,547.49
Deferred liabilities:		
Other deferred liabilities	\$16,483.28	\$141,392.03
Total deferred liabilities	\$16,483.28	\$141,392.03
Unadjusted credits:		
Tax liability	\$220,629.25	\$206,175.37
Accrued depreciation—equipment	6,070,695.76	6,930,965.21
Other unadjusted credits	281,750.49	414,267.32
Surplus—Investment, equipment and other property purchased	7,171,556.79	7,171,556.79
Total unadjusted credits	\$13,744,632.29	\$14,722,964.69

(Testimony of M. J. Curry.)

	Dec. 31, 1929	Dec. 31, 1930
Surplus:		
Additions to property through income and surplus.....	\$6,758,472.14	\$7,439,295.80
Funded debt retired through income and surplus.....	549,884.98	599,313.98
Sinking fund reserves.....	353,651.42	399,853.64
Profit and loss balance.....	*442,880.09	*2,344,674.98
Total surplus.....	\$7,219,128.45	\$6,093,788.44
Total liabilities.....	\$150,833,263.65	\$155,345,367.31

*Denotes red figures.

Policy As to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company, in consideration of the listing of the securities covered by this application, agrees with the New York Stock Exchange as follows:

To notify the New York Stock Exchange promptly of any change in the general character or nature of its business.

(Testimony of M. J. Curry.)

To notify the New York Stock Exchange immediately if it or any subsidiary or controlled company should dispose of any property or of any stock interest in any of its subsidiary or controlled companies, when such disposal would impair or materially affect its financial position or the nature or extent of its operations as theretofore conducted.

Subject to Interstate Commerce Commission regulations, to publish periodical statements of earnings, as agreed upon with the Committee.

To publish at least once in each year and submit to stockholders at least fifteen days in advance of the annual meeting of the corporation, a Balance Sheet, an Income Statement for the last fiscal year and a Surplus statement of the applicant company as a separate corporate entity and of each corporation in which it holds directly or indirectly a majority of the voting stock: or, in lieu thereof, eliminating all inter-company transactions:

(a) a similar set of financial statements fully consolidated as to the applicant company and all corporations in which it owns directly or indirectly a majority of the voting stock, or

(b) a similar set of financial statements consolidated as to the applicant company and specifically named or described subsidiaries, with separate similar financial statements for each unconsolidated corporation in which the applicant company holds directly or indirectly a majority of the voting stock.

Such statements shall disclose fully the nature

(Testimony of M. J. Curry.)

and extent of the interest of the applicant company in the corporations whose unconsolidated financial statements are furnished, and also the existence of any default in interest, cumulative dividend requirements or sinking fund or redemption fund requirements of any of the corporations whose accounts are thus consolidated or separately shown.

Subject to Interstate Commerce Commission regulations, to publish all future annual financial statements of any character, in the form contained in the listing application and, in the publication of reports of earnings for any period of less than a fiscal year, to show net profits in the aggregate and per share after Depreciation, Depletion, Income Taxes and Interest, estimating the proportionate amount of these items as accurately as may be if not finally determined at date of publication.

Not itself, and not to permit any subsidiary, directly or indirectly controlled, to take up as Income stock dividends received at an amount greater than that charged against Earnings, Earned Surplus or both of them by the issuing Company in relation thereto.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of

(Téstimony of M. J. Curry.)

New York, south of Chambers Street, other than its transfer office or agency in said city, where all listed securities shall be registered. If its transfer books should be permanently closed, to continue to split up certificates of listed stock into smaller denominations in the same name so long as such stock shall be retained upon its list by the New York Stock Exchange. If its transfer office or agency should be or should become located north of Chambers Street, to arrange, at its own cost and expense that its registry office will receive and re-deliver all securities deposited at such registry office for the purpose of transfer.

Not to add to the number of its transfer agencies nor to make any change of a transfer agency, or of a trustee of its listed bonds or securities, without prior notice to the Committee on Stock List, and not to add to the number of registrars of its listed stock nor to change a registrar of its listed stock without the prior approval of the Committee on Stock List, nor to select an officer or director of the company as a trustee of its mortgages or other listed securities unless such officer or director be a co-trustee for an issue having a corporate trustee.

Not to make any change in the form or nature of its listed securities or in the rights or privileges of the holders thereof, without having given twenty days' prior notice to the Committee on Stock List of such proposed changes, and having made appli-

(Testimony of M. J. Curry.)

eration for the listing of the securities as changed, if the Committee on Stock List so requires.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted its securities, or of any other rights or benefits pertaining to ownership in its securities, and to afford the holders of its listed securities a proper period within which to record their interests and to exercise their rights, and to issue all such rights in form approved by the Stock Exchange and to make the same transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To make application to the Stock Exchange for the listing of additional amounts of listed securities sufficiently prior to the issuance thereof to permit action in due course upon such application.

To forward to the Stock Exchange copies of all notices mailed to stockholders looking toward Charter amendments, and to file with the Stock Exchange two copies of amended Charter, or Resolutions of Directors in the nature of amendments (one of which must be certified), as soon as such amendments or resolutions have become effective.

To notify the Stock Exchange of the change or removal, to a substantial extent, of collateral deposited under any of its mortgage or trust indentures under which listed securities are outstanding.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

(Testimony of M. J. Curry.)

To furnish the New York Stock Exchange, on demand, such reasonable information concerning the company as may be required.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 25, 1931 are: Arthur Curtiss James, Thomas M. Schumacher, Arthur W. Loasby and Winthrop W. Aldrich, of New York, N. Y.; Frank E. Sullivan, William Fries, J. G. Hooper, Scott F. Ennis, Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin, and F. M. Angellotti, of San Francisco, California; John L. Nagle, of Sacramento, California; Charles Elsey of Oakland, California; Frederick E. Williamson and James E. Gorman, of Chicago, Illinois; L. W. Baldwin, of St. Louis, Missouri; and C. W. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, Arthur W. Loasby, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and H. M. Adams, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James; Chairman

(Testimony of M. J. Curry.)

of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Executive Vice-President, Charles Elsey; Vice-Presidents, E. W. Mason, J. F. Hogan and M. J. Curry; Secretary, W. G. Bruen; Treasurer, E. C. Bates; Assistant Secretary and Assistant Treasurer, M. J. Curry; Assistant Secretaries, Thomas J. Byrne and C. L. Droit.

The Bonds are interchangeable as to denomination and may be transferred and registered at The Chase National Bank of the City of New York, 11 Broad Street, New York, N. Y.

The Agents for the payment of interest are The Chase National Bank of the City of New York and Crocker First Federal Trust Company of San Francisco, California.

The place for the payment of the principal is at the office of The Chase National Bank of the City of New York.

**THE WESTERN PACIFIC
RAILROAD COMPANY,**

By **M. J. CURRY,**

Vice-President.

This Committee recommends that the above-mentioned \$5,000,000 First Mortgage 5% Gold Bonds, Series A, due March 1, 1946, included in numbers M-43551 to M-48550, for \$1,000 each (and registered bonds issued in exchange for coupon bonds) be added to the list on official notice of issuance, sale and distribution, in accordance with the terms

(Testimony of M. J. Curry.)

of this application, making the total amount authorized to be listed \$49,302,800.

FRANK ALTSCHUL,

Chairman.

Adopted by the Governing Committee, March 11,
1931.

ASHBEL GREEN,

Secretary.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Exhibit No. 12. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: That is all I have, your Honor.

Mr. Wood: If your Honor please, in respect to these exhibits, I want to make clear the position of the First Mortgage Trustees. [1170] I do not intend to object to their admission in evidence, but I want to make clear that we do not consider that these listing applications or listing statements which they contain are proper evidence, because they are not binding upon the First Mortgage Trustees. We are perfectly willing that they go in the record, and we can argue the question of their relevancy in the argument and briefs.

The Court: Very well.

Mr. Sloss: If your Honor please, I should like to introduce an exhibit through Mr. Curry. It is prob-

(Testimony of M. J. Curry.)

ably not cross-examination, but I imagine it would be simpler to take it up at this time.

Q. Mr. Curry, you are an officer, are you not, of the Western Pacific Railroad Corporation?

A. I am.

Q. Which holds all of the stock of the Debtor?

A. I am.

Q. And you are familiar with the holdings of stock in that corporation by the Western Pacific Corporation? A. Yes, sir.

Q. There has been prepared as an exhibit a statement showing the percentage of the preferred stock of the corporation held by A. C. James and two corporations which he owns, supplementing paragraph 48 of the Stipulation of Facts. Have you that exhibit?

A. I have, Mr. Sloss. It happens to be in my papers.

Q. I will hand you this copy and I will ask you whether the statements therein are correct as shown by the stock records of the corporation?

A. Yes, sir, to the best of my knowledge they are correct.

Mr. Sloss: If your Honor please, we will offer this in evidence on behalf of the Corporation as Western Pacific Railroad Corporation's Exhibit No. 1. Copies have been handed to counsel.

(The document was marked "Western Pacific Railroad Corporation's Exhibit 1.")

(Testimony of M. J. Curry.)

WESTERN PACIFIC RAILROAD CORP.

EXHIBIT No. 1

The Western Pacific Railroad Corporation

**MEMORANDUM RE HOLDINGS OF
PREFERRED AND COMMON STOCK.**

At the close of business on September 13, 1939 there were outstanding (excluding treasury stock) 574,501 shares of the common stock and 381,250 shares of the preferred stock of The Western Pacific Railroad Corporation.

The holdings of such shares, as shown by Paragraph 48. of the "Stipulation as to Facts not in Dispute", held by Arthur Curtiss James, Curtiss Southwestern Corporation and Curtiss Southwestern Company, constituted the following percentages of the total outstanding stock of each of such classes, to-wit:

Of the preferred stock 8.76%

Of the common stock between 61% and 61.5%

Figures and computation furnished by M. J. Curry, Sec. and Treas. of The Western Pacific Railroad Corporation.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Western Pac. R. R. Corp. Exhibit No. 1. Filed 1/22/1940. Walter B. Maling, Clerk.

The Court: Anything further of this witness?
That is all, [1171]

J. W. WILLIAMS,

Called by the Institutional First Mortgage Bondholders Committee; Sworn.

The Clerk: Will you state your name to the Court, please? A. J. W. Williams.

Direct Examination

Mr. Swaine: Q. Will you state your occupation, Mr. Williams?

A. Chief Engineer of the Western Pacific Railroad Company.

Q. Were you present this morning when Mr. Elsey testified as to the present efficiency of the property? A. Yes.

Q. Do you concur in his judgment? A. Yes.
Mr. Swaine: That is all.

The Court: Any questions? That is all.

Mr. Clay: We have two witnesses for the R. F. C. I would like to call Mr. Blyth.

CHARLES R. BLYTH,

Called by Reconstruction Finance Corporation; Sworn.

The Clerk: Will you state your name to the Court? A. Charles R. Blyth.

Direct Examination

Mr. Clay: Q. Will you state your business, Mr. Blyth?

(Testimony of Charles R. Blyth.)

A. I am the President of Blyth & Company, a corporation that has been in business for twenty-five years in handling investment bonds, investment securities.

Q. They are engaged in the business of distributing and underwriting?

A. Underwriting and distributing, yes.

Q. They also underwrite securities?

A. Yes, they do.

Q. And take participation in public offerings, do they not? A. That is correct. [1172]

Q. And you have handled railroad securities?

A. Yes, we have.

Q. And you have branches both in San Francisco and New York? A. Yes, we do.

Q. With your head office here. Have you studied the characteristics of the new First Mortgage Bonds provided for in the Western Pacific plan?

A. Yes, I have.

Q. Have you formed any conclusion as to whether your firm would be interested in those bonds?

A. My firm would not be interested in those bonds at any price that I could imagine would be acceptable.

Q. Do you think any private underwriter would be interested in taking them to re-sell to the public?

A. I feel sure they would not.

Q. Do you think they would be salable through private channels?

(Testimony of Charles R. Blyth.)

A. Only that certain private individuals might be interested from a speculative standpoint in perhaps offering to buy the bonds at a big discount. They would not be available to institutional buyers.

Q. Why would they not be available to institutional buyers?

A. The chief buyers of that kind are in the East, in New York City, largely—New York savings banks and the larger institutions. The law provides a certain continuity of earnings as applicable to a sufficient amount to pay bond interest over a period of years before they would be available for such institutional investment. These bonds do not qualify.

Q. You stated a moment ago that they would not be salable except to somebody who would take them at a big discount. What do you mean by a big discount? Can you estimate at what discount they would be salable to someone?

A. These bonds I think would bear what is called in our business a rating of about "A", according to Moody, which is one of the standard organizations. We are forced to recognize these ratings. Bonds that bear an "A" rating usually yield at the present market about $4\frac{1}{2}$ per cent. It would mean that the [1173] market value of these bonds, if you could forget everything except the pure statistics, would range around 90, I should say.

Q. That is, a prospective buyer who was willing to take them and hold them might pay 90, but could not re-sell publicly?

(Testimony of Charles R. Blyth.)

A. He could not re-sell them; it would be purely a speculation.

Q. Have you any other reasons which you would like to give for the conclusions you have stated?

A. I think that the most important consideration is the historical background of the Debtor corporation. I think that the public is very slow to fancy a bond which is the obligation of a corporation which has been in default, or has been reorganized, we will say, twice in about 25 years, I think. It doesn't give you much confidence in what the future might bring forth, even though the reduction in the debt, compared to what it previously had, seems to be very small.

Q. You state that they would not be legal investments for institutions. Aren't the institutions such as insurance companies and savings banks at the present time the largest buyers of a publicly-offered railroad bond?

A. They are almost the only buyers. Railroad bonds at this rate of interest are not attractive to the individual investor. They won't buy them.

Q. Do you think these bonds could be sold to anybody except R. F. C.?

A. I am sure they could not.

Mr. Clay: That is all.

The Court: Any questions?

Mr. Coulson: May I ask a question?

The Court: Yes, Colonel.

(Testimony of Charles R. Blyth.)

Cross Examination

Mr. Coulson: Q. Mr. Blyth, you are familiar with the fact that during the years 1936, 1937 and 1938 there were considerable expenditures on this property by way of the completion of an improvement [1174] and rehabilitation program?

A. I have seen the figures. I am not a close student of this situation; I don't want to pose as that, but I do know that that is a fact.

Q. Do you know, Mr. Blyth, that a large part of those expenditures, almost half, were necessarily charged to the operating expenses of the company?

A. I did not know that.

Q. Well, I state to you, Mr. Blyth, that during the years 1936, 1937, and 1938 approximately ten million dollars was spent on the improvement and rehabilitation of this property, and that of that amount almost half was charged to operating expenses under Interstate Commerce Commission rules, and I ask you, would the investment public recognize in buying bonds the necessity of some readjustment in the operating income to eliminate that extraordinary factor?

A. I do not think the investment public would concern itself with that, except to say it was a sign of great weakness that a road had to do that.

Q. Let me go on further, Mr. Blyth, then: This Court will shortly have before it the 1939 operating income of this property. I ask you to assume that the operating income of the Railroad Company will

(Testimony of Charles R. Blyth.)

be approximately \$1,800,000. Would that sum constitute, in your mind, taking the year 1939 alone into account, an adequate coverage for an issue of ten million 4 per cent first mortgage bonds on the property?

A. If you want me to answer directly, yes, but I should think——

Q. I will bring it out. I know what you have in mind. Mr. Blyth, assuming that that year 1939 were the first year in which this extraordinary influence on income appeared. Would you think that those earnings for 1939 would have some significance to an investor?

A. Can I make a statement before I answer that?

Q. Answer it and then explain. A. Yes.

Q. I think I know what you have in mind. I intend to bring it out, [1175] but go ahead and explain. A. All right; I will wait.

Q. Mr. Blyth, if this property had earned for a reasonable period of years a sum comparable with its earnings in the year 1939 as assumed in my question, you would regard the coverage as adequate under the standards which investment bankers apply for an issue of ten million dollars first mortgage 4 per cent. bonds? A. Yes.

Q. Now, will you explain to the Court, if I haven't brought out what you have in mind?

A. I thought I was trying to answer whether these bonds were salable or not, and the fact that

(Testimony of Charles R. Blyth.)

the road might have made money in two or three years would not necessarily affect them.

Mr. Coulson: I think that is clear, Mr. Blyth, but I just wanted the record clear also as to the fact that we are dealing with a record where the earnings are not significant. Thank you, Mr. Blyth.

Mr. Clay: That is all, Mr. Blyth.

The Court: That is all.

Mr. Clay: I wish to call Mr. Futterer.

CHARLES FUTTERER,

Called for the Reconstruction Finance Corporation;
Sworn.

The Clerk: Will you state your name to the Court, please? A. Charles Futterer.

Direct Examination

Mr. Clay: Q. Mr. Futterer, will you state in your own words what your past experience has been?

A. I am presently employed as an examiner in the Railroad Division of the Reconstruction Finance Corporation. After graduation from high school in 1920 I attended the University of Maryland, and graduated from the George Washington University in 1930. From graduation date from high school I was employed by the Western Maryland Railway Company in its mechanical [1176] and transportation departments for a continuous service of two

(Testimony of Charles Futterer.)

years, and during summer vacations in the same railroad. From 1925 to 1932 I was employed by the Bureau of Railway Economics, which is a division of the then American Railway Association, now a division of the Association of American Railroads. The Bureau of Railway Economics has a department supported by railroads that engages in scientific study of railroad problems which have to do with statistical analysis and other research matters dealing with freight rate investigations, and so on.

From February, 1932 until July, 1936 I was engaged by the Reconstruction Finance Corporation in its Railroad Division, serving in various capacities there as an examiner. In the tour of duty it was necessary for me to prepare reports for consideration of the directors of the R. F. C. on applications for loans to railroads, which necessitated an appraisal of the collateral offered, and other matters that an ordinary lending organization would consider.

From 1936 until the close of 1939 I was employed by the Young Management Corporation in New York City, an investment counsellor firm, and by the Union Trust Company, of Pittsburgh, in their respective research and statistical departments. In these departments I was assigned the duties of submitting material that lent themselves to the consideration of the investment committees of those institutions with regard to the purchase, sale or retention of railroad securities.

(Testimony of Charles Futterer.)

Since my return to the R.F.C., in the Railroad Division, I have been assigned similar duties heretofore outlined.

Q. In passing upon applications, or in making recommendations to the directors of the R.F.C., do you not have to consider whether the prospective borrower can obtain the money from private sources?

A. It is my understanding that under the Act that enables the R. F. C. to make loans, that it is necessary that the company cannot borrow [1177] funds through regular banking channels at reasonable terms.

Q. And, therefore, both in your duties with the R.F.C. and in your duties with the investment counsel in New York and Pittsburgh, you have had to study marketing conditions?

A. That is true.

Q. And the possibility of railroads being able to borrow through private channels?

A. That is correct.

Q. Have you made any study of the public offerings of railroad securities in recent years?

A. I have.

Q. Is this a chart which you have prepared?

A. Yes.

Q. And from what was the information on that chart taken?

A. Principally from the Commercial and Financial Chronicle.

Q. Was it not all taken from the Commercial and Financial Chronicle? A. Yes, it was.

(Testimony of Charles Futterer.)

Q. In other words, the correction shown on the chart in ink is a correct correction?

A. That is right.

Q. And the data on here is correct as shown by the Commercial and Financial Chronicle?

A. That is correct.

Mr. Clay: I would like to offer this as R.F.C. Exhibit No. 1.

The Court: How is that designated, briefly?

Mr. Clay: The chart is headed "Offerings of Railroad Bond Issues, 1937-1940."

The Witness: Your Honor, may I interpose a correction, there, to say that it is 1938 to '40?

Mr. Clay: Yes, the heading should be changed from 1937 to 1938.

(The document was marked "R.F.C. Exhibit No. 1.")

R. F. C. EXHIBIT No. 1

OFFERINGS OF RAILROAD BOND ISSUES 1937-1940

1940		Rate Series	Description	Dated	Date Due	Sold to Bankers % Price Cost	Offered to Public % Price Yield	Amount
	Louisville and Nashville.....	3½	10 yr. Coll. Tr. Bds.	Jan. 1, 1940	Jan. 1, 1950	99½	100	\$30,000,000
	".....	4	20 yr. Coll. Tr. Bds	Jan. 1, 1940	Jan. 1, 1960	98½	100½	30,000,000
								Total \$60,000,000
1939	September Norfolk & Portsmouth Belt Line R. R. (1).....	1½	Refunding	Apr. 1, 1939	1940-1949			700,000
August	Terminal R. R. Assn. of St. Louis (2).....	3¾	"B" Refunding & Improvement	Jul. 1, 1939	Jul. 1, 1974	100.66	102.60	7,000,000
June	Wheeling & Lake Erie.....	3½	"F"	Jun. 15, 1939	Jun. 15, 1966	Par & Accrued		5,250,000
"	".....	2½	"E"	Jun. 15, 1939	1940-1949	"		2,188,000
"	Winston-Salem Terminal Co. (3).....	3½	—	Sep. 1, 1939	Sep. 1, 1970	2.90		800,000
"	Atlanta Terminal Co. (4).....	4	— 30 yr. Bds.	Aug. 1, 1939	Aug. 1, 1969	100.512 and Acc'd		1,600,000
March	Wabash-St. Charles Co. (5).....	4	— First Mtge. Bds.	Mar. 1, 1939	1935-1959	101		2,085,000
February	Cincinnati Union Terminal Co. (6).....	3¾	"E"	Feb. 1, 1939	Feb. 1, 1969	107.38	3.0	12,000,000
								Total
1938	December Chesapeake & Ohio Ry.....	3½	"F" Refunding & Improvement	Dec. 1, 1938	Dec. 1, 1963	100	— 101½	30,000,000
March	Duluth Missabe & Iron Range.....	3½	— First Mtg. Bds.	Oct. 1, 1937	Oct. 1, 1962	—	98	28,000,000

Source: The Commercial & Financial Chronicle and Bank and Quotation Record.

Guarantors

- (1) Southern Ry. and Virginian, Atlantic Coast Line, C. & O., Norfolk & Western, Receivers of Norfolk Southern, Penn. R. R., Receivers of Seaboard Air Line.
- (2) Louisville Nashville, Chi Rock Island & Pac., Southern Ry., I. C., Alton, C. B. & Q., C. & E. I. Ry., Mo. Pac., St. Louis-San Francisco, Pitts, Cinn., Chi. & St. Louis, Wabash, M-K-T, St. Southwestern, B. & O., Cleve., Cin., Chi. & St. L.

- (3) Southern Ry., Norfolk & Western, Winston-Salem Southbound Ry.
- (4) Southern Ry., Central of Georgia, Atlanta & West Point R. R. Co.
- (5) Wabash Ry. Co. and its Receivers
- (6) Norfolk & Western, Baltimore & Ohio, Chesapeake & Ohio, Cincinnati New Orleans & Texas Pacific, Louisville & Nashville, Pennsylvania.

[Endorsed]: United States District Court, No. 26591, Western Pac. R. R. Co. R. F. C. Exhibit No. 1. Filed 1/22/1940. Walter B. Maling, Clerk.

(Testimony of Charles Futterer.)

Mr. Clay: Q. Will you in your own words comment on this exhibit?

A. To date in 1940 the principal, or the only railroad bond issue that has been offered to the public, has been the 10- and 20-year collateral trust notes of the Louisville & Nashville Railroad. Those were sold to bankers in the first instance, [1178] the 3½s of 1950 at 99½, and the 4s of the 20-year maturity at 98½. The L. & N., serving as it does part of the Pocahontas Coal Region and Southeastern Coal Regions has had a long and established record of satisfactory earning power. For years it has been enabled, by virtue of its position and credit and resources, to pay dividends on its common stock, with probably one exception in 1933.

In 1939 the issue of railroad bonds to the public was limited, other than those of terminal companies, to the issue of the Wheeling & Lake Erie Railroad Company, which sold at 31⅞ and 21⅞, with maturities of 1970 and 1969. Of my own personal knowledge I know that the 21⅞ issue of Wheeling & Lake Erie was taken solely by one institution, and the 31⅞ were taken altogether by insurance companies and institutional investors.

In so far as the terminal companies are concerned, as will be shown by the footnote in the exhibit, they are in nearly every instance guaranteed by companies or their receivers.

Q. Take one, for example.

A. For example, to take the strongest one, probably, on the exhibit, is the Cincinnati Union Ter-

(Testimony of Charles Futterer.)

minal, which has as guarantors such predominant railroad earners as the C. & O., Norfolk & Western, Louisville & Nashville, P. R. R., and C. N. O. & T. P., which is controlled directly or indirectly by the Southern Railway; and the Terminal Railroad Association of St. Louis, where the guarantee may not be established by the fact that the credit position of the guarantors is so good, which I am not admitting, but, nevertheless, it provides such an essential facility that they just could not get along without it, and, naturally, bankers or other persons, other investors, are willing to take a railroad security of that character.

Q. In other words, is there only one railroad bond issue which was offered during 1939 which does not come under the category of a [1179] terminal issue guaranteed by one or more railroads?

A. In so far as the Commercial and Financial Chronicle report, the Wheeling & Lake Erie bonds were the only ones offered privately or to the public in 1939.

Q. During the entire year?

A. During the entire year.

Q. All right. Do you consider the Wheeling & Lake Erie a security that is comparable to the new Western Pacific bonds?

A. Well, this issue of the Wheeling & Lake Erie, while it is a junior mortgage, none the less it is an obligation of a railroad company that has been able throughout the depression to earn its

(Testimony of Charles Futterer.)

fixed charges at least one and one-half times in the poorest year, and has been able, probably, with the first dividend since its reorganization in 1916 of \$7 in 1937, was still able to pay one in 1939 of \$5 on the common.

Q. Do you consider these Western Pacific bonds comparable to the Louisville & Nashville bonds which have been publicly offered this year?

A. The Louisville & Nashville bonds, being collateral trust notes, are not comparable with respect to the assets securing them; but, nevertheless, viewing the bonds from the standpoint of a private individual as an investor, or an institutional buyer, the asset value is overcome very much by the earnings record of the company in the mind of a person who is willing to put his funds in the railroad industry in general, or the particular company that has an opportunity to sell.

Q. Do the L. & N. and Wheeling & Lake Erie extend into the same general region?

A. No, the Louisville & Nashville was considered probably a Southern carrier, whereas the Wheeling & Lake Erie's predominant operations are from Toledo and Cleveland to Wheeling, and can be considered as probably one of the Great Lakes carriers. Nevertheless, both the Louisville & Nashville and the Wheeling & Lake Erie are both coal carriers, and for that particular reason [1180] are not subjected to the wide fluctuations in earning power that a railroad, say the Western Pacific,

(Testimony of Charles Futterer.)

is subject to, in that it does not have a commodity that is predominant in its tonnage, like coal.

Q. Is that observation true, also, of the Chesapeake & Ohio Railway?

A. The Chesapeake & Ohio is one of the strongest railroad companies in the country, from an earnings standpoint, and enjoys that position by reason of the fact that it operates in the Pocahontas coal fields. It has paid continuous dividends since 1922.

Q. Now, that brings you down to the last offering on the list, the Duluth, Missabe & Iron Range.

A. In 1938 the Duluth, Missabe & Iron Range sold their 3 $\frac{1}{2}$ s in the amount of \$28,000,000. As you know, the Duluth, Missabe & Iron Range is a wholly owned subsidiary of United States Steel, and its prosperity depends on the transportation of iron from the Missabe and Vermillion ranges to the lakes. That originally was taken by the parent company in the amount of thirty million dollars, and when the market became propitious they offered it to the public at a price of 98, and the Steel Company still retained two million out of an originally authorized amount of thirty.

Q. Summarizing your exhibit, or summarizing your testimony in regard to the exhibit, do I follow you that during the period shown on the exhibit only four railroad bond issues were publicly sold which do not come into the classification of terminal issues?

A. Correct.

(Testimony of Charles Futterer.)

Q. Guaranteed by other carriers?

A. Correct.

Q. Have you studied the provisions of the Western Pacific plan? A. I have.

Q. And the characteristics of the new First Mortgage Bonds? A. I have.

Q. Have you formed any conclusion as to the salability of these [1181] bonds through private channels?

A. I have, yes. In considering the possibility of the sale of the new mortgage bonds of the re-organized debtor, I have first taken the element of the general disfavor into which secured obligations of railroads in general have fallen. As heretofore adverted to, only the obligations of the strongly entrenched companies—operating companies—have been able to market their bonds in the past three years.

Q. In other words, only three roads in the United States, during the last three years?

A. Yes.

Q. As shown by the Commercial and Financial Chronicle?

A. Yes. In considering the railroad industry in general, one must take note that it has been affected by competition of carriers that have not probably been brought into proper competitive control; that the railroad industry is burdened with rigid costs that include taxes, and that elements affecting the Western Pacific in particular are not

(Testimony of Charles Futterer.)

so much different from that that affects the railroad industry in general. One important—

Q. Have you made a particular study of the factors that affect the Western Pacific, or prepared any charts to illustrate your testimony?

A. I have. I have attempted to prepare a chart that shows by way of explanation the factor of safety for the new fixed mortgage interest-bearing bonds of the Western Pacific Railroad.

Q. Is this a copy of that chart, or is this the chart? A. Yes.

Q. Where did you obtain the figures and information shown on that chart?

A. As indicated by the footnotes, the total operating revenues, the income available for interest, and the adjusted income available for interest as shown respectively by columns 1, 3 and 5, were taken from the Stipulation in these proceedings. The other figures were computed from the Stipulation.

Q. The other figures are mere mathematical compilations, are they not?

A. Correct. [1182]

Q. The result of mathematical computations?

A. I might suggest with regard to this exhibit that it might be clearer in column 10 if it was shown that the result was column 1—just strike that. I think it is clear as it stands.

Q. And these computations are correct?

(Testimony of Charles Futterer.)

A. To the best of my knowledge and belief they are correct.

—Mr. Clay: I would like to offer this as R.F.C. Exhibit No. 2. It is a table headed "Western Pacific Railroad Company indicated income remaining after proposed interest charges and per cent. of gross revenues of such income remaining, 1922-1938, inclusive."

(The document was marked "R.F.C. Exhibit 2.")

R. F. C. EXHIBIT No. 2

THE WESTERN PACIFIC RAILROAD COMPANY*
INDICATED INCOME REMAINING AFTER PROPOSED FIXED CHARGES AND PERCENT OF GROSS
REVENUES OF SUCH INCOME REMAINING—1922-1938, INCLUSIVE

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
	Par. 74	% Inc.	Par. 75	% Inc.	Par. 76	% Inc.		Net Re-	Net Re-	% Remain-	% Remain-
Year	Total Operat-	or Dec.	Income	or Dec.	Adjusted	or Dec.	Estimate	mainder	mainder	der of gross	der of gross
	ing revenues	over	available	over	Income	over	Fixed	Col. (3)—	Col. (5)—	revenue after	remainder
		previous	for	previous	available	year	Charges	Col. (7)	Col. (7)	Col. (3)	after Col. (5)
		year	Interest	year	for Int.					(Col. (8)÷1)	(Col. 9÷1)
1922	\$12,736,564	—	\$2,306,124	—	\$2,404,890	—	\$494,000#	1,812,124	1,910,890	14%	15%
1923	14,414,812	+13%	3,313,976	+ 44%	4,412,234	+ 83%	"	2,819,976	3,918,234	20	27
1924	14,669,313	+ 2	3,144,124	— 5	3,241,823	— 27	"	2,650,124	2,747,823	18	19
1925	15,898,548	+ 8	4,454,352	+ 42	4,557,798	+ 41	"	3,960,352	4,063,798	25	26
1926	17,951,468	+13	4,759,282	+ 7	4,868,390	+ 7	"	4,265,282	4,374,390	24	24
1927	18,306,675	+ 2	2,674,494	— 44	3,470,861	— 29	"	2,180,494	2,976,861	12	16
1928	19,421,851	+ 6	2,964,371	+ 11	4,376,972	+ 26	"	2,470,371	3,882,972	13	20
1929	20,096,557	+ 3	2,529,846	— 15	3,718,436	— 15	"	2,035,846	3,224,436	10	16
1930	18,819,062	— 6	1,552,487	— 39	2,381,529	— 36	"	1,058,487	1,887,529	6	10
1931	14,852,938	—21	Def. 186,708	Def.	Def. 220,494	Def.	"	Def. 680,708	Def. 714,494	Def.	Def.
1932	12,251,071	—18	252,706	—	283,912	—	"	Def. 241,294	Def. 210,088	Def.	Def.
1933	12,202,489	No chg.	674,007	+167	474,365	+ 67	"	180,007	Def. 19,635	1	Def.
1934	13,779,238	+13	1,084,244	+ 61	1,396,353	+194	"	590,244	902,353	4	7
1935	14,407,458	+ 5	805,589	— 26	1,377,026	— 1	"	311,589	883,026	2	6
1936	16,547,344	+15	181,102	— 78	1,901,423	+ 38	"	Def. 312,898	1,407,423	Def.	9
1937	17,918,485	+ 8	Def. 903,113	Def.	1,007,407	— 43	"	Def. 1,397,113	582,407	Def.	3
1938	16,057,451	—10	Def. 243,916	Def.	225,431	— 79	"	Def. 1,737,916	Def. 268,569	Def.	Def.

#Excludes \$500,000 Capital Fund.

*System figures.

Source: Column (1) Paragraph 74 of the stipulation;

Column (3) Paragraph 75 of the stipulation;

Column (5) Paragraph 76 of the stipulation;

All other columns computed from stipulated figures.

January 20, 1940.

[Endorsed]: United States District Court, No. 26591. Western Pac. R. R. Co. R. F. C. Exhibit No. 2.
Filed 1/22/1940. Walter B. Maling, Clerk.

(Testimony of Charles Futterer.)

Q. Mr. Futterer, will you comment on this exhibit and discuss it in your own words?

A. The purpose of this exhibit is to point out the so-called factor of safety for railroad mortgage bonds. Generally speaking, it is possible that a reduction or drastic reduction in fixed charges would offer assurance to the average railroad investor that he would be protected in income and probably in principal at the maturity of his obligation. A drastic reduction in fixed charges, obviously, would assist in restoring the credit position of any company. But such a reduction, or such a course is possible only when the margin of expenses over revenues, taking into consideration the normal fluctuations in the business cycle, and railroad earnings, would give what we might call a buffer for the fixed charges as indicated under the plan, and which are 494,000 odd. For this purpose we might take the years 1936 and 1937 for comparative reasons. In the former year—that is 1936—the income available for fixed charges as shown in column 5 on the adjusted basis, which takes into consideration the rehabilitation program and amortization of discount on funded debt and other adjustments that are specified—the margin of protection,—that is what was left after you paid the bare fixed interest charge—[1183] es—was only 9 per cent. of the total operating revenues of the Western Pacific System. Now, theoretically—and it could happen actually—if you had a decline of say 9 or

(Testimony of Charles Futterer.)

10 per cent. in your gross revenues, which would not be an unusual situation or fluctuation in railroad earnings, you would wipe out the coverage for your fixed charges, which indicates that, so far as the marketability of a bond and its standing from an investor's standpoint, is damaged to that extent. One bad year might put it into disrepute that four or five good years would have similarly built it up.

Q. Look at the year 1938. What decline in gross revenues was there in 1938 as compared with the years 1936 and 1937?

A. In 1938 the gross revenues of the Western Pacific System declined 10 per cent. under 1937, and was slightly less than it was in 1936. None the less that decline on the adjusted basis, as shown in paragraph 5, you only had \$225,431 available for the bare fixed charges under the plan, resulting in a net deficit, or a coverage of such fixed charges of about 50 per cent.

Q. That is, a 10 per cent. decline in gross revenues reduced the amount available for the payment of interest to \$225,000?

A. Yes. Of course, that statement should be qualified to the extent that it is possible for management of a railroad to adjust its expenses in some respects to minimize the amount of the decline in the total volume of business handled.

Q. Would it not also be true if taxes and other expenses increased 10 per cent., your margin of safety would be gone?

(Testimony of Charles Futterer.)

A. It would conversely operate that way. If you would assume the same level of operating revenues, and as we had in our recent experience of 1937, when the railroad retirement taxes and increase in the general wage level pushed the operating expenses of railroads generally to an all-time high level—in that situation, assuming [1184] the same level of total operating revenues and an unexpected increase in expenses, the margin of safety for the bonds could be similarly wiped out.

Q. You mentioned the year 1937 and the results of 1937 as shown on your exhibit. Was that not a relatively good year?

A. 1937, in so far as industry was concerned, and many railroads in particular, was the best year since 1930.

Q. From the standpoint of freight revenues of the Western Pacific, how would you compare 1937 with previous years?

A. Outside of the exhibit, but in the record I am sure, it would be noted that the freight revenues of the Western Pacific System in 1937 were just about $11\frac{1}{2}$ per cent. more than in the year 1929. While this increase was impressive, because of changed conditions in the industry it was necessary for the Western Pacific, in order to establish such a record, to transport 18 per cent. more tonnage than in 1939, as measured—

Q. Pardon me; you mean 1929? A. 1929.

Q. You said 1939.

(Testimony of Charles Futterer.)

A. —1929 as measured by total revenue net ton miles. While this increase might be used to measure the potentialities of the reorganized company, it is none the less true that, between 1929 and 1937 the average revenue per ton mile on the Western Pacific Railroad declined 11 per cent., or, in figures, from somewhere around 9½ mills to about 8.6 mills.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until two o'clock p. m.)

[1185]

Afternoon Session

The Court: You may proceed.

Mr. Clay: Mr. Futterer.

CHARLES FUTTERER

Recalled:

Ⓢ Direct Examination

(Resumed).

Mr. Coulson: If your Honor please, in the hope of shortening the proceeding somewhat, with Mr. Clay's permission, I would like to make a brief statement. As I understand it, this witness has testified, like the prior witness, to the fact that under the existing conditions, bonds such as these proposed bonds of the Western Pacific, First Mortgage Bonds, which are refund trustees' certificates, are not marketable through ordinary channels, and that

(Testimony of Charles Futterer.)

the R.F.C. would be the only available customer at par. I don't understand that any of the objectors are going to put in any contrary testimony, and, as representing my client, I would be glad to concede, for purposes of the record, that in view of the earnings record of the Western Pacific, these bonds are not marketable through ordinary channels. The importance of it is that the R.F.C. is organized and authorized only to buy such bonds when they cannot be marketed through ordinary channels at par, and it will all have to be made the subject of a further proceeding before the Interstate Commerce Commission at the time the bonds are actually offered to the R.F.C.; it seems to me we are only extending the record and taking up time by further testimony by Mr. Futterer as to the grounds upon which he arrived at his conclusion as an expert.

Mr. Swaine: If your Honor please, I think it goes a little further than that, from the standpoint of my clients. Several of the objections involve the issue as to whether the R.F.C. has been given an unfair consideration for taking these bonds. In [1186] other words, I think your Honor appreciates that under the Commission's plan the R.F.C. has been given treatment better than it would be entitled to for its present claim in protecting the rights of that present claim, in consideration of its taking new bonds; so, there is not only the question as to whether, under the technicalities of the R.F.C., the R.F.C. can take the bonds—that is, whether

(Testimony of Charles Futterer.)

they are marketable—but, as to whether the consideration which the Commission has prescribed in the Commission's plan constitutes excessive consideration; so, I think this testimony is relevant to that.

Mr. Clay: Your Honor, that is the whole point: the various parties are objecting that the R.F.C. is receiving preferential treatment; that is the issue we are meeting.

The Court: Yes.

Mr. Clay: On the point of consuming time, Colonel Coulson need not be alarmed, because I have only a few more questions.

The Court: You may proceed.

Mr. Clay: Q. Mr. Futterer, you heard Mr. Blyth's testimony this morning? A. I did.

Q. And the statement that the Western Pacific bonds—fixed interest bonds, could not be sold profitably except at a price of 90; do you agree with what Mr. Blyth said in that connection?

A. I think that the estimated discount of 10 points, as suggested by Mr. Blyth, is on the side of conservatism. 10 points would be a reasonable expectation that the bonds would sell at.

Q. Had you estimated a larger discount?

A. Well, with the benefit of Mr. Blyth's considered opinion, I would go on a little further and say—or would have said—they probably would have sold at a discount of 15 to 20 points.

Q. Have you read the Stipulation in this case?

(Testimony of Charles Futterer.)

A. I have.

Q. And in forming your conclusions you have taken into consideration [1187] the data contained in the Stipulation? A. Yes.

Q. You are aware that the Stipulation shows that the book value of the property of this Debtor is around \$173,000,000? A. Yes.

Q. And the value for rate-making, around one forty-four? A. Yes.

Q. In your experience, would a prospective purchaser of the bonds inform himself as to these figures?

A. I am of the opinion that an ordinarily prudent investor would take in these elements of value in considering the value of the bonds to be issued, but only as a secondary consideration to the primary one that the earning power of the property is the important base upon which to rest the fixed capitalization of the property.

Q. You said "important base." Will you expand that? Important relative to what other factors?

A. Well, with respect to the factor of safety to which I have already alluded, it seems to me that the earning power of the property is primarily the most important consideration, although valuation and book investment, and those other elements, are proper considerations.

Q. You mean the earning power and the factor of safety that you discussed this morning?

A. Yes.

(Testimony of Charles Futterer.)

Q. Would a prospective bidder of the bonds consider any other factors?

A. Yes, a person that would make a loan on any property would probably take into consideration—and particularly, with reference to the Western Pacific—that in California, Nevada and Utah the assessed valuation—

Mr. Sloss (interrupting): Just a minute; we desire to object to any testimony on the question of the assessed valuation of these properties, on the ground it is incompetent, irrelevant, and immaterial, and I am prepared to cite a number of authorities in support of that objection.

Mr. Clay: The testimony is not being offered as testimony of the value of the property; it is merely testimony as to what [1188] factors the bond buyer would inform himself to in making a bid on the bonds.

The Court: Overruled.

Mr. Clay: Will you proceed?

Mr. Sloss: May I have an exception also, your Honor?

The Court: Yes.

The Witness: (Continuing) The valuation of the Western Pacific in the States of California, Utah and Nevada, for the year 1939 amounted to \$22,858,555.

Mr. Clay: That is all as to this witness.

The Court: Any cross?

(Testimony of Charles Futterer.)

Cross Examination

Mr. Sloss: Q. Mr. Futterer, on this matter of the assessed valuation, will you kindly explain how you take that into account as bearing upon the value or salability of the bonds?

A. The assessed valuation of the Western Pacific for tax purposes in those States is an element of value that can be taken, just the same as the valuation, for rate-making purposes, or the book investment of the company; it is an element to be considered among others.

Q. Is it a factor that, in your opinion, would be taken into account by the ordinary investor in determining whether a bond is or is not a good investment?

A. It may not be taken into account by an ordinary investor, but certainly, by a person who is presenting to his clients all the material facts relating to a bond, he would be prepared to answer such questions.

Q. Have you made any study of the method of assessing property for tax purposes in California?

A. I have not.

Q. Or in Nevada? A. I have not.

Q. Or in Utah? A. I have not.

Q. And do you know whether or not, as a matter of fact, property—I am speaking not only of railroad property, but of any property— [1189] is in any of those States, assessed by the taxing

(Testimony of Charles Eutterer.)

authorities at its actual value, or anything approaching it?

A. I would presume that it would not be assessed at its actual value; however, I have been informed that in Nevada, taxes on the railroad property there are approximately the actual value of the property.

Q. You have made no investigation about California? A. No.

Q. And you don't know whether or not it is the fact that in California, ordinarily, real property is assessed at 50 per cent. or less of its real value, and, personal property, at a still smaller ratio? A. I am not informed as to that.

Mr. Sloss: We will move, if your Honor please, to strike out the testimony of the witness as to assessed valuation, on the ground that it appears that there is no foundation for the testimony as relating to any issue in this case.

The Court: I don't understand that it was offered for the purpose of fixing value; I understand it was offered for the purpose of showing it was one of the elements that might be considered by the prospective buyer.

Mr. Sloss: So limited, it is perhaps not so objectionable.

The Court: Denied.

Mr. Coulson: If your Honor please, I would like to have the record clear that I object to the testimony of the witness as to the assessed valuation.

(Testimony of Charles Futterer.)

and move to strike it out, on the ground that no sufficient basis was laid for his testimony as to what the assessed valuation actually was in these States, and the qualification of this witness as a witness—

The Court (Interrupting): Is it worth making such a fuss about?

Mr. Coulson: I would like the record to be clear that we do not admit that testimony as testimony in the case for all purposes, [1190] in the first place, your Honor, and in the second place I would like the record to be quite clear that we object to proving assessed values without showing any relationship, and what relation it has to the property, generally, of the Debtor.

The Court: Mr. Clay—is that your name, sir?

Mr. Clay: Yes, sir.

The Court: I understood that you were not offering this for the purpose of proving value.

Mr. Clay: We are not; we are offering it merely as evidence of one of the factors that a prospective purchaser of the bonds would look into.

Mr. Coulson: Your Honor, if Mr. Clay will limit this testimony to being one of the factors of information which this witness had, from which he arrived at his conclusions, rather than affirmative testimony for this Court as to the fact, I am perfectly content.

Mr. Clay: Well, as to that, Colonel, if you will limit the testimony which is in the record as to valuation for rate-making—

(Testimony of Charles Futterer.)

The Court. (Interrupting): I don't think the assessed value of the property in California would have great weight with the Court in fixing the value of this property, because, as Judge Sloss has pointed out, the assessors in California do not assess property here for its full value, and, as he further pointed out, real property is assessed at perhaps 50 per cent. of its value, and maybe less, and personal property is scaled down much lower, so it wouldn't have any weight at all. I don't think, with the Court. I think you simply offered it for the purpose of showing it was one of the elements a prospective purchaser of stocks or bonds might take into consideration in buying this stock, before he bought the stock. It might be natural for a man to look up the assessed valuation of property, but, as I say, gentlemen, I [1191] don't think it is worth bothering much about; your motion, Colonel, is denied.

Mr. Coulson: Exception.

The Court: Yes.

Mr. Clay: May I make this remark: that, as I see the issue in this case, the issue is valuation for the purpose of reorganization, and I would like to take a similar exception to the relevancy and materiality of the evidence which Colonel Coulson has included in the Stipulation as to valuation for rate-making, and as to book values.

The Court: Yes?

(Testimony of Charles Futterer.)

Mr. Clay (Continuing): These figures are not relevant or material to the issue before this Court.

The Court: Is that before me now?

Mr. Coulson: The question will be before your Honor on the argument; I doubt if it is before your Honor at the moment. There is a good deal to be said about it—

The Court: Do you wish me to make a ruling at this time on that, Mr. Clay?

Mr. Clay: I do, because the stipulation expressly reserves the right of any party to object to the materiality or relevancy or competency of the evidence that was stipulated to, and I merely request that my objection be recorded so that there will be no question raised later that no objection was made.

The Court: Your objection will be overruled.

Mr. Clay: Q. Mr. Futterer, this figure as to the aggregate valuation for tax purposes; where did you obtain that?

A. That was handed to my counsel by the secretary of the Western-Pacific Railroad Company, and presumably—or, in fact, the source of the information were the records of the trustee of the Western-Pacific Company. [1192]

Q. You mean the trustees in bankruptcy?

A. In bankruptcy.

Mr. Clay: That is all.

The Court: I suppose we are all agreed that that would not be an element in fixing value, are we not? You agree to that, yourself, do you not, Mr. Clay?

(Testimony of Charles Futterer.)

Mr. Clay: I do, your Honor.

The Court: Anything further of this witness?

Mr. Coulson: May I ask him just one or two questions, to complete the table? It is the table where you deal with coverage in relation to gross, Mr. Futterer.

Mr. Clay: I think that is Exhibit No. 2; Exhibit No. 2 for R. F. C.

Mr. Coulson: Q. Mr. Futterer, when you prepared this table for Mr. Clay, I assume you did not have available the earnings for 1939?

A. That is correct.

Q. So they are not included for that reason?

A. The year 1939 was not included.

Q. Now, under our Stipulation, the final figures of the Debtor's Trustee, as reported to the Court, and as they will be reported to the Court within a few days, are to become part of the record. I would like to ask you—for I have the estimates from the Agent of the Debtor's Trustee—what the result would be if you take for the year 1939 the estimate of gross—your column 1—16,700,000, and for your columns 3 and 5, 1,800,000—

Mr. Swaine: (Interrupting) Just a second, Colonel, the final figure that has already gone in is 1,005,000.

The Witness: 1,539,860, according to the testimony this morning.

Mr. Coulson: That was for the system, and this is for the company, Mr. Clay, the Railway Company,

(Testimony of Charles Futterer.)

itself. I am right, Mr. Elsey, in showing the company alone would be a million eight [1193] hundred—

Mr. Elsey: The company alone.

Mr. Coulson: That is what this total is based on—

Mr. Swaine: So that your Honor will understand what we are talking about, the company earnings include a good many fictitious earnings from subsidiaries, which are, in fact, deficits for which the company has to make advances to the subsidiaries. What we are reorganizing here is the system.

Mr. Coulson: Let me find out from Mr. Futterer.

Q. Mr. Futterer, the earnings, both total operating revenues and earnings available for interest, refer to after adjustment—that is, in columns 1, 3, and 5; what have you used, system earnings, or company earnings?

A. System earnings, as set forth in the Stipulation.

Q. Well, then, let me modify my question to you: assuming that you have for the year 1939, as system earnings, 16,700,000, and for the net available for interest—

Mr. Swaine, what was your amount?

Mr. Swaine: A million five.

Mr. Coulson: Well, let's take a million five hundred thousand.

Q. (Continuing) Now, will you indicate to the Court briefly what effect that will have on columns 2, 4, 6, 9, and 11? I think you can do that very quickly, so as to bring this down through 1939,

(Testimony of Charles Futterer.)

which is, because of the deflection of earnings, based on the rehabilitation program, and in our judgment the more significant figure, your Honor.

The Witness: May I interrupt just a minute? Your "available for fixed charges" showed 1,539,868.60.

Mr. Swaine: The adjusted figure was 1,005,000—my recollection is that the figure, without adjustment, was one million four hundred four, whereas the figure after adjustment was one [1194] million five thirty-nine; that was introduced by Mr. McCollum this morning.

Mr. Coulson: Is the sixteen million seven hundred right?

Mr. Elsey: For the system?

Mr. Coulson: For the system.

Mr. Swaine: No, it is not.

Mr. Coulson: What is the correct figure?

The Witness: 18,299,412.

Mr. Coulson: Q. Good. Let's use our eighteen million two ninety-nine and the two figures given for the—one million four, for income available for interest, before adjustment, and 1,539,860 after adjustment, and just indicate briefly, so the record will be complete, what the effect is on your other column?

Mr. Clay: Your Honor, is this necessary? You have given a certain figure, and the other results follow.

(Testimony of Charles Futterer.)

Mr. Coulson: I am trying to keep the prior mathematical computation that has been introduced from being too confusing to the Court by failure to carry this down close to date. This whole question of marketability of the bonds is a question that is prospective, and the tabulation, which is only a tabulation from matters of record, is a little confusing unless he can cover the year 1939; and I think he can give you these figures very quickly.

The Witness: A. For column 1, taking the gross revenues on the basis of the same testimony submitted this morning, 18,299,412; column 2, the increase over the prior year, would be 14 per cent. Taking Mr. Coulson's adjusted figure of a million four—

Q. (Interrupting) That is Column 3, you are speaking of? That is not the adjusted figure, as I understand it; column 3 is the income available for interest, before adjustment, is that right?

A. The actual figure that was put in this morning was 1,539,860. [1195]

Q. That was after adjustment, as I understand it; the one million four is before adjustment, and one million five thirty-nine, after.

The Witness: A. Based on the prior year, the percentage comparison with one million four—that is column 3—would be without any relevant significance, by reason of the fact the prior year ran a deficit. In column 5, the adjusted income, 1,539,860 over the prior year, would represent an increase of approximately 600 per cent.

(Testimony of Charles Futterer.)

Q. Plus 600.

A. (Continuing) The net remaining, column 8, 906,000; the net remaining, column 9, 1,045,860.

Q. Now, as to this coverage—

A. As to the margin of protection on the basis of the earnings in 1939, as submitted this morning, what you would have left after the payment of the bare fixed charges, excluding the capital fund—in the first place, before adjustment, you would have a little less than 5 per cent. as a margin of safety; on the basis of your 1,539,860, you would have a little bit over 5 per cent., which is an unsafe margin.

Q. What goes into column 10 and column 11?

A. That is percentage there (indicating).

Q. What are the percentages? A. 4 and 9.

Q. What? A. 4 and 9.

Q. And in column 11? A. Column 11, 5.

Q. 5? A. Yes, a little over 5.

Q. You gave this testimony this morning about this Louisville & Nashville issue, I believe?

A. That is right.

Q. What was the coverage of the percentage of remaining gross revenues in accordance with your column 10 and 11 as to that issue?

A. I haven't that before me.

Q. Do you know what the average coverage is in the percentage of gross and railroad bonds today? A. For the industry?

Q. For the industry.

(Testimony of Charles Futterer.)

A. In 1938 the figure was an aggregate [1196] net deficit; for 1939, I don't think anybody knows yet.

Q. And you don't know what it was for the L. & N.? A. No, I don't.

Mr. Coulson: My recollection is that it was about 6 per cent., but I don't dare put it in unless you know. That is all.

The Court: ~~Anything further?~~

Mr. Clay: I have nothing further of this witness.

Mr. Buckland: I wasn't going to ask this witness anything, I just wanted to offer some exhibits here.

(Witness excused.)

The Court: Yes.

Mr. Buckland: I propose, in the course of the argument in behalf of the Railroad Credit Corporation to cite two opinions of District Courts that are not reported. I have a certified copy of the opinion of the District Court of the United States for the Eastern District of Missouri, by Judge Davis, given in 1938, findings of fact and conclusions of law, and the memorandum of decision, in regard to Order No. 1 given by Judge Hinks, United States District Judge for the District of Connecticut. Both of them, your Honor, have to do with the right of a railroad corporation as a creditor—as a secured creditor, to obtain, currently, the income from the

collateral, and to apply it to the principal or interest of the debt in its untrammelled discretion. Now, I don't know what the practice of the Court is here with respect to unreported opinions. I have here the originals, and I have plenty of copies to distribute to counsel, and I would like to have the privilege either of offering them as exhibits, or the privilege of referring to them in my argument.

The Court: You certainly would have a right to refer to them in your argument; whether or not they should be received in evidence, I can't say, unless you offer them. If you offer them and there [1197] is no objection, they will be received.

Mr. Swaine: I don't believe they should be received in evidence. We had the same problem in respect to unreported opinions in respect to the Akron, Canton & Youngstown Case and the Louisiana Northern Case, but we tried to meet it in our brief by printing the unreported opinions as annexes to the brief, but on the other hand, so far as I am concerned, I think all parties ought to be able to refer to any decision, whether reported or not, subject only to the condition that the Court be supplied with a copy of the decision that is being placed before it.

Mr. Buckland: Your Honor, I had anticipated that, because I have typewritten copies of all the opinions here, which I will be very glad to distribute to counsel; I didn't know whether it was customary to offer them as exhibits in evidence.

Mr. Swaine: I don't think they are part of the record in the case.

The Court: Properly speaking, they are not part of the record. You may refer to them in your argument, and you may furnish the Court with copies of them.

Mr. Buckland: That was all I wished to know.

[Endorsed]: Filed Oct. 10, 1940. [1198]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge:

This is a proceeding under section 77 of the Bankruptcy Act¹ for the reorganization of the Western Pacific Railroad Company.

On August 2, 1935, the Debtor filed a petition stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization. The court approved the petition and authorized the Debtor, pending further order of the court, to continue in possession of and operate and maintain the railroad and its properties, and to manage and conduct its business as a railroad company. Trustees were appointed and ratified by the Interstate Commerce Commission. "The judicial functions of the bankruptcy court and the ad-

(1) 11 USCA, § 205. [1200]

ministrative functions of the Commission work co-operatively in reorganizations.

Thereafter all necessary legal steps required by the Act were taken, and on February 8, 1936, Debtor filed a plan of reorganization with the Commission. In addition, plans were filed on behalf of the Institutional Bondholders Committee, and on behalf of A. C. James Co. On August 1, 1937, the Bureau of Finance of the Interstate Commerce Commission issued a proposed report containing a recommended plan of reorganization to which exceptions were filed by the Debtor, the Institutional Bondholders Committee, the First Mortgage Trustees, the Refunding Mortgage Trustee, A. C. James Co., Reconstruction Finance Corporation, and the Railroad Credit Corporation. Hearings were had before the Commission, and on October 10, 1938, the Commission issued its original report and order approving a plan of reorganization.³

On December 9, 1938, the Debtor, the Institutional Bondholders Committee, the Refunding Mortgage Trustee, A. C. James Co., Reconstruction Finance Corporation and the Railroad Credit Corporation filed their separate petitions with the Commission for rehearing and modification of the original report and order and the plan of reorganization approved therein. Answers to certain of said

(2) *Warren et al. v. Palmer et al.*, Case No. 643, decided by the Supreme Court on April 29, 1940; *Palmer v. Massachusetts*, 308 U. S. 79, 87, note 14.

(3) 230 I. C. C. Reports, page 61. [1201]

petitions were filed by the First Mortgage Trustees and The Railroad Credit Corporation. Proposals for modification of the Commission's plan were attached to or contained in such petitions. A rehearing on the basis of these petitions was granted by order of the Commission entered December 30, 1938.

On June 21, 1939, the Commission issued its "Report and Order on Further Consideration"¹⁴ (hereinafter referred to as the supplemental report and order) approving a modified plan of reorganization (hereinafter and hereinafter referred to as the Commission plan). By its report and order of June 21, 1939, the Commission modified the original report and revoked and rescinded the original order.

On or about August 1, 1939, and prior to the certifying to the court of the Commission plan and the record before the Commission, the Debtor filed a petition for rehearing and modification of the Commission plan. Answers thereto were filed by certain parties. Said petition was denied by the Commission by a report and order entered September 19, 1939.

Pursuant to the requirements of subsection (d) of section 77, the Commission on or about September 28, 1939, certified to the court the Commission plan together with a transcript of the proceedings before it and a copy of the supplemental report and

(4) 233 I. C. C. Reports, page 409. [1202]

order approving the plan, which were filed in this proceeding on October 3, 5 and 6, 1939.

On November 8, 1939, the court, pursuant to the provisions of subsection (e) and of clause 8 of subsection (c) of section 77, entered its order fixing the time within which objections to the Commission plan and claims for equitable treatment might be filed herein, fixing the time within which applications might be filed for expenses and fees incident to the reorganization, and fixing December 8, 1939, as the date for the filing of such objections and claims for equitable treatment and petitions for an allowance for compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred, in connection with the proceeding and plan of reorganization up to and including October 31, 1939, and providing for the giving of due notice by the Debtor's trustees to creditors and stockholders, or their representatives, and all other parties in interest.

Petitions for intervention were granted to several parties in interest, and pursuant to the order of November 8, 1939, objections to the Commission plan and claims for equitable treatment were filed by or on behalf of the Debtor, the Institutional Bondholders Committee, the Refunding Mortgage Trustee, A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation, and The Western Realty Company. [1203]

On December 18, 1939, the court, pursuant to Rule 16 of FRCP, held a pre-trial conference of

the attorneys for the parties in interest. At the conference the parties agreed upon substantially all the facts upon which depend the decision of the issues raised by the objections and claims for equitable treatment; and accordingly, on December 20, 1939, filed a "Stipulation as to Facts Not in Dispute." The parties failed to agree upon a stipulation as to the issues. On December 21, 1939, the court made its order fixing January 22, 1940, as the time for hearing objections to the plan of reorganization. On December 29, 1939, the court made its order reciting the action taken at the pre-trial conference and ordered "that the issues for trial of said hearing on January 22, 1940, shall be the issues raised and presented by said objections to said plan of reorganization and by said claims for equitable treatment."

The Debtor owns or operates 1,207.51 miles of standard gauge railroad. A main line extends eastward 924.17 miles from Oakland, California, to Salt Lake City, Utah. The Northern California Extension extends northward 111.81 miles from Keddie to Bieber, California, with operating rights from Bieber to Hambone, California—46.38 miles—over the Great Northern Railway. In addition to said main line mileage and the Northern California Extension, the Debtor has approximately 131.66 miles of branch line mileage springing from the Oakland-Salt Lake City line.

Reference is hereby made to the original report and order of the Commission⁵ for more detailed

(5) 230 I. C. C. Reports, page 61 et seq. [1205]

descriptions of the property owned and controlled by the Debtor, its corporate and financial history, financial structure, traffic and revenue, earnings available for charges, classes of creditors and stockholders, and the proposed plans of reorganization. Such reference is made for the purpose of shortening this opinion and because the data contained in the Commission's original report is in the main correct. However, it is to be understood, unless otherwise stated herein, that facts and figures stated in this opinion and upon which it is based, are from the "Stipulation as to Facts Not in Dispute", the record certified to the court by the Commission, and additional proof offered in open court.

The essential, undisputed facts with respect to the Commission plan necessary for the court's determination of the issues, are set forth in the following summarization, taken from the brief of the Institutional Bondholders Committee, because concisely stated. The Commission plan, which by its terms is to be made effective as of January 1, 1939, provides the following capital structure for the reorganized company:

Title of Issue	Presently Issued	Interest, Dividends or Other Income Charges
Undisturbed Existing Equipment Trusts, Baldwin Lease and Pullman Contract	\$2,750,050	\$ 94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total Annual Fixed Charges		\$494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise non-cumulative	21,219,075	954,858
Total Funded Debt	\$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		\$1,949,060
Income Mortgage Sinking Fund		106,095
Participating 5% Preferred Stock (\$100 par value). Dividends non-cumulative, participating share for share with Common Stock in dividends declared in any year after dividends have been declared on Common Stock at rate of \$3 per share	31,850,297	1,592,515
Total securities with par value	\$65,819,422	
Total annual charges, Capital Fund, Sinking Fund and Preferred dividend requirements		\$3,647,670
Common Stock (without par value)	319,441 shares	

The existing claims against, and interests in, the Debtor dealt with by the Commission plan, together with interest accrued from the last interest payment date to the effective date of the plan, January 1, 1939, computed at the contract rates, are as follows. Brevity demands the use of initials for the names of claimants in the following tables, foot-

notes and context, as RFC for Reconstruction Finance Corporation, ACJ for A. C. James Co., W. P. Corp. for Western Pacific Railroad Corporation, RCC for The Railroad Credit Corporation:

[1206]

Claim or Interest	Principal of claim or interest	Accrued interest at contract rate to effective date of plan	Total claim, including interest at contract rate to effective date of plan
Trustee's Certificates	\$10,000,000.00	\$	\$10,000,000.00
Undisturbed existing equipment obligations	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
RFC Collateral Notes (a)	2,963,000.00	899,869.98	3,862,869.98
RFC Collateral Notes (b)	2,445,609.88	145,314.23	2,590,924.11
ACJ Collateral Notes (c)	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	\$72,448,559.88	\$15,533,112.87	\$87,981,672.75
W P Corp. advances off open account	5,768,791.00	1,980,429.00	7,749,220.00
The Western Realty Company (d) advances on open account	50,000.00	11,667.00	61,667.00
Total debt	\$78,267,350.88	\$17,525,208.87	\$95,792,559.75
W P Corp., owner of the entire outstanding 283,000 shares of Preferred Stock, par value \$100 per share	28,300,000.00		28,300,000.00

W. P. Corp, owner of
the entire outstanding
475,000 shares
of Common Stock,
par value \$100 per
share

47,500,000.00

47,500,000.00

Totals \$154,067,350.88 \$17,525,208.87 \$171,592,559.75

(a) The notes held by RFC are secured by the pledge of \$8,750,000, principal amount, of refunding mortgage bonds, series A, and \$2,000,000, principal amount, of refunding mortgage bonds, series B; by the pledge of voting trust certificates for 150,000 shares of common stock of Denver & Rio Grande Western Railroad Company, pledged with RFC by W. P. Corp.; and by a second lien upon \$2,000,000 of refunding mortgage bonds, series A, now pledged with RCC.

(b) The notes held by RCC are secured by the pledge of \$2,000,000, principal amount, of refunding mortgage bonds, series A, and \$2,000,000 principal amount, of refunding mortgage bonds, series B, of which \$2,000,000, principal amount, of series A bonds were repledged with it by ACJ. In addition, such notes are secured by a second lien on all the securities pledged with RFC; by a first lien on the Debtor's distributive share in the fund established by the marshalling and distributing plan, 1931; by a first lien on the advances from W. P. Corp. to the Debtor in the sum of \$5,494,722; by a lien on the advances made by W. P. Corp. to Standard Realty and Development Company in the sum of \$120,000; and by a lien on the advances made by W. P. Corp. to Sacramento Northern Railway in the sum of \$856,260, subject, as to the Sacramento Northern advances, to any and all rights and claims in respect thereof, if any, of the trustees or the holders of first mortgage bonds.

(c) The notes held by ACJ are secured by the pledge of \$6,249,500, principal amount, of refund-

The Commission plan provides for the distribution of the securities of the reorganized company among the existing security holders of the Debtor as follows:

Existing Securities of Debtor	New First Mortgage 4% Bonds, Series A	New Income Mortgage 4½% Bonds, Series A	New 5% Preferred Stock, Series A, (\$100 par)	New Common Stock (No Par)
5% First Mortgage Bonds		\$19,716,040	\$29,574,060	230,593 shs.
RFC New Money (In ex- change for Trustee's Certificates all now held by RFC.)	\$10,000,000			
Collateral Notes		1,185,200	1,777,800	15,788 shs.
RCC Collateral Notes		154,111	241,681	35,425 shs.
ACJ Collateral Notes		163,724	256,756	37,635 shs.
Totals	\$10,000,000	\$21,219,075	\$31,850,297	319,441 shs.

The first mortgage bonds are allotted new income mortgage bonds for 40% of the principal of their claim, new preferred stock for 60% of the

ing mortgage bonds, series A, of which \$2,000,000 principal amount, are subject to the prior lien of RCC as pledgee, ACJ having repledged said \$2,000,000 of such bonds with RCC as additional collateral security for the Debtor's note to RCC.

(d) While Western Realty Company is a separate corporate entity, [1207] which has separately intervened and appeared in this proceeding, all of its stock is held by W P Corp. Its rights as a creditor of the Debtor are identical with those of W P Corp. as a creditor of the Debtor. Accordingly, for the sake of simplicity, it and its rights are hereinafter included in any reference to W P Corp or W P Corp's rights as creditor of the Debtor unless the context otherwise requires. [1208]

principal of their claim and new common stock for 100% of their accrued interest, such common stock having been allotted at the price \$57 per share.

RFC is allotted treatment in respect of its collateral note *pari passu* with the treatment allotted the first mortgage bonds in consideration of its exchanging its \$10,000,000 trustees certificates for \$10,000,000 new first mortgage bonds or purchasing said bonds at par to retire said trustees certificates.

RCC and ACJ are allotted new securities on the following basis: From the new securities, which the Commission finds are properly issuable in respect of the refunding mortgage bonds held as collateral for the RFC, RCC and ACJ notes, are deducted that proportion of each class which the principal amount of refunding mortgage bonds held by RFC as collateral bears to the total amount of pledged refunding mortgage bonds. The balance of such new securities is then divided between RCC and ACJ in proportion to the principal amounts of refunding mortgage bonds held by them respectively as collateral. The result is the allotment of common stock to RCC on its claim at the price of \$62.00 per share.

The unsecured claims of The Western Pacific Railroad Corporation and The Western Realty Company, and other unsecured claims not entitled to priority over existing mortgage, are found by the Commission to be without value and not entitled to participate in the distribution of cash or securities of the reorganized company.

The capital stock of the debtor (all held by W. P. Corp.) is found by the Commission to be without equity or value and the stockholders not to be entitled to participate in the plan.

The issues raised by the objections relate, first, to the amount and character of the capitalization, second, to the distribution of the new securities among the holders, and, third, to the execution of the Commission plan.

It is objected by A. C. James Co., The Western Pacific Railroad Corporation, The Western Realty Company, the Debtor, and The Railroad Credit Corporation, that the Commission plan is unfair and inequitable and fails to afford due recognition to the rights of each class of creditors and stockholders in relation to the value of the assets of the Debtor; that it is discriminatory and does not comply with the law of the land; and that it is confiscatory of private property rights, in violation of the Fifth Amendment to the Constitution. While it is not asserted that section 77 is unconstitutional, objectors argue that it "should not be interpreted as authorizing the confiscation and destruction of private property," and that as "the findings and conclusions of the Commission result in such confiscation and destruction [they] are in violation of the Constitution and the law of the land." These questions go to the heart of the matter.

The powers and functions of the Commission and [1209] the court are found in subsections (d) and (e) of section 77.⁶ Subsection (f) incorpor-

(6) By the provisions of section 77(b) of the Bankruptcy Act, as amended; a plan of reorganization shall include provisions modifying or altering the rights of creditors generally, or any class of them, secured or unsecured, either through the issue of new securities of any character or otherwise; shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in the light of its earning experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; and shall provide adequate means for the execution of the plan. Subsection (e) of section 77 provides that the judge shall approve the plan certified to the court by us, if satisfied, after hearing, and without hearing if no objections are filed, that the plan complies with the provisions of subsection (b), is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; that the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of the hearing, are reasonable, are within such maximum limits as are fixed by us, and are within such maximum limits as to be subject to the approval of the judge; that the plan provides for the

ates the provisions of section 20a⁷ of the Interstate Commerce Act relative to issuance of securities. Subsection (d) provides that the Commission "shall approve a plan * * * that will in its opinion meet with the requirements of subsections (b) and (e) of this section, *and will be compatible with the public interest.*" [Italics supplied.] Similar terms are to be found in paragraph 2 of section 20a and paragraph 3 of section 5 of the Interstate Commerce Act. In *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 24, it was held that such a delegation of authority to the Commission was not invalid because the stated criteria is uncertain.

In its original report and order the Commission

payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances for the actual and reasonable expenses, including reasonable attorney's fees, incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries, and such assistants as we, with the approval of the judge, may especially employ, may be paid in securities provided for in the plan if those entitled thereto will accept such payment. By the provisions of subsection (d) of section 77, the plan approved by us, must meet with these requirements of subsections (b) and (e) and be compatible with the public interest, but such plan may be different from any which has been proposed. Original report and order of Commission, 230 I.C.C. Reports, pages 86 and 87.

(7) 49 USCA, §20a. [1210]

said: "It will be observed that so far as the capitalization of a reorganized company is concerned, section 77 contains no limitations other than that the fixed charges of the company shall be adequately covered by the probable earnings available therefor, and that the plan as a whole shall be compatible with the public interest. The public interest is not defined, but it would seem obvious that to be compatible with the public interest the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization shall not exceed a conservative appraisal of the assets to be taken over by the reorganized company, and that proposed charges, whether fixed or contingent shall be within its probable earning power."⁸

The construction given by the Commission to the term "public interest" is neither new nor arbitrary, but has been consistently followed before and since the enactment of section 20a of the Interstate Commerce Act.

The last paragraph of subsection (c) of section 77 provides: "The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only, such effects shall be given to the

(8) 230 I.C.C. Reports, 61, 87. [1211]

present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land in light of its earning power and all other relevant facts." This paragraph was incorporated in the statute as part of the 1935 amendments.

Mr. Leslie Craven, attorney for the Railroad Security Owners Association, who was counsel for Honorable Joseph B. Eastman when he was Federal Coordinator of Transportation, testified at the hearing before the Special Sub-Committee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives in 1939, concerning this legislation. The particular amendment was drawn by Mr. Craven and sponsored by him and Mr. Eastman. Mr. Craven says that "the valuation provisions in the existing law were so drawn that whoever tried to upset the valuation of the Commission would not be able to do it. The language is left in generalities. * * * As the Act stands, the value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relative facts."¹⁰ [1213]

(9) H. Rep., 76 Congress, 1st Session on §1869, Serial No. 11, part 1, 1939, Railroad Reorganization, p. 464. [1212]

(10) H. Rep. 76 Congress, *supra*, pp. 485, 486. In discussing the quoted provision (subsection (e) of 77), Mr. Craven said in an article in the

The idea of a sound financial structure in railroad reorganization is not an innovation. In Missouri-Kansas-Texas Reorganization, 76 I. C. G. 84, 108, (1922), in administering the provisions of the Transportation Act of 1920, Commissioner Eastman said: "In the past such reorganizations have largely been a matter of bargain and trade between groups of security holders without adequate con-

Harvard Law Review: "Amendments simplifying and clarifying the determination of the valuation were required, because the provisions of the original act [the 1933 Act] enabling an elimination of the consent of claimants demonstrated to have no interest by a valuation, or for the value of whose interest a cash payment was provided, were regarded as unworkable because of the great task of valuing property of such magnitude and because of uncertainty as to the results, due to doubt as to the legal principles governing such a valuation. The assignment of the determination to the courts, as provided in the original Act, was inappropriate. The courts are ordinarily inexperienced with this technical problem, while the Commission has had extended experience since 1913 in its administration of the LaFollette Valuation Act. This experience has indicated great difficulty in making such determinations, if the kind of value to be determined in a reorganization case is the same as a value for rate-making purposes under the principles of *Smyth v. Ames* * * *. The obstructive possibilities open to the equity and creditor interests, through the probability of prolonged hearings and litigation involving these complicated questions, were evident from the Commission's valuation cases. That the equity interests were well aware of the strategic value to them of the original provisions of section 77 was evidenced by the in-

sideration of the paramount public interest, so that the results have often been consistent neither with the public interest nor even with sound business principles, and recurring receiverships have been far from uncommon. * * * The public interest, I think, clearly demands that a reorganized property should begin its new career with a capitalization which will enable it, if that be possible, not only to

sistence with which they fought any simplification of the process. They asserted that value in a reorganization case is the same as in a rate case.

* * * * *

“The purpose of these provisions [the provisions contained in the last paragraph of subsection (e) of section 77] is to lodge the determination of the value in the Commission in the first instance, and to incline the determination away from the doctrine of *Smyth v. Ames*, under which the value is fixed on the basis of a consideration of the original and reproduction cost of the property and the investment therein. [1213] The actual value of the property cannot be determined, nor is it ordinarily evidenced by the investment in the property or its present cost of construction. The railroads are competitive properties. The value of their operative property, for purposes of reorganization, must necessarily be what, for better terms, we may call the actual value or the economic worth of the property, as determined primarily by its present and prospective earning capacity. The actual value of the property depends upon the demand for its service and its ability to meet the demand economically. The provisions of the amended statute, therefore, make clear that emphasis shall be put on a consideration of earning power, past, present and prospective.”—Leslie Craven and Warner Fuller, “The 1935 Amendments of the Railroad Bankruptcy Law,” 49 Harv. L. Rev. 1254, 1272, 1274. [1214]

keep clear of bankruptcy but also to attract the capital necessary for future development." And in the Denver & Rio Grande Western Reorganization, 90 I. C. C. 141, 157 (1924), Commissioner Eastman said: "It seems to me that we should at least insist, in the case of any such reorganization, that the new company shall start life with a reasonably sound financial structure. If this were our policy, reorganization managers would stand on firmer ground in dealing with the holders of the securities of insolvent companies than they now find under their feet." In Chicago, Milwaukee & St. Paul Investigation, 131 I.C.C. 615 (1928), a reorganization matter, the Commission again expressed dissatisfaction with the state of the law which it was said presented a situation fundamentally unsatisfactory and required reform. The subject has been repeatedly discussed in Congress,¹¹ and such discussions undoubtedly induced the enactment of the amendments of 1935 for the purpose of clarifying the then existing law. Having in mind the judicial history of railroad reorganizations, and the provisions of the Transportation and Interstate Commerce Acts,

(11) As reflecting these discussions I quote the following from report No. 454 of the Senate Committee on Interstate Commerce, issued on May 18, 1939:

"For the purpose of creating a sound financial structure, it is immaterial what may at one time have been invested in the road, what it originally cost, what it would cost to reproduce, or what its value may be claimed to be as an abstraction. The

Congress in its wisdom, by the amendments of 1935, delegated to the Commission, where it logically belongs and can best be performed, authority to determine for any purpose the value of the property of the railroad seeking reorganization.

It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned. For a period of four years, since August, 1935, the Debtor has

controlling question is: What can the property earn to support its capital structure?

"It would be tantamount to fraud to create worthless securities in reorganizations, securities that cannot be reasonably expected to be supported by earnings. That would be simply creating tokens for stock-market speculation.

* * * * *

"Reorganizations cannot succeed if they are based on claimed values that have long since disappeared in a realistic sense and on business that has long since been lost to the railroads never to return. A reorganization based on a sound judgment of earning power destroys no values and creates no losses. It merely [1215] realistically recognizes the facts, including the unpleasant but nevertheless inescapable fact that values based on original cost or even reproduction cost simply do not exist without earning power to support them."

—H. Rep., 76 Congress, 1st Session, serial 11, part 1, 1939, Hearing on Railroad Reorganization, p. 346.

been before the Commission in an intensive investigation of its affairs in the present proceeding.¹²

(12) In its original report, 230 I.C.C. 61, the Commission said: "Under section 19a of the Interstate Commerce Act, this Commission, by division 1, in Western Pacific Ry. Co., 29 Val. Rep. 239, reported the value for rate-making purposes of the property owned by the debtor to be \$63,321,000 as of June 30, 1914, excluding working capital. In other proceedings, we reported the value for rate-making purposes of the properties of the debtor's wholly owned subsidiaries, Sacramento Northern Railway; Tidewater Southern Railway Company, and Deep Creek Railroad Company, in the total amount of \$18,123,283, as of their respective valuation dates. If there were added to the above amounts the net costs of additions and retirements between valuation dates and December 31, 1935, the total would be \$139,600,455." (Original Report, p. 76.)

* * * * *

"If this reorganization is to be successful, the capital structure of the reorganized company must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future." (Original Report, p. 87.)

* * * * *

"It is true that, considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, [1216] in our opinion, those factors cannot be of controlling importance in a determination of the capital structure for the re-

In its original report and order the Commission says:

"The present reorganization of the debtor is the second since it began complete operations in 1911. A review of its financial history shows that due to an inherent lack of earning power its past operations have resulted in financial failure, and that the investment in its property has not been justified by its earnings. In Denver & R. G. Investigation, 113 I.C.C. 75, we pointed out that economically the original construction of the debtor was an ill-advised undertaking. If this reorganization is to be successful, the capital structure of the reorgan-

organized company. Considering all relevant data of record, we find that the approved plan should provide for the immediate issue by the reorganized company of not to exceed 295,740.3 shares of preferred stock of the par value of \$100 per share, and not more than 313,703 shares of no-par-value common stock." (Original Report, p. 94.)

* * * * *

"Under the provisions of section 77, stockholders are not entitled to participate in the plan if we find, and the judge affirms the finding, that at the time of the finding the equity of such stockholders has no value. Section 77 also contains a similar provision with respect to creditors whose claims have been found to have no value. We have hereinbefore found that, considering the past, present, and probable future earnings of the debtor, its investment, the data of record pertaining to its rate-making value, and all other relevant data of record, we can not approve the issue of new securities in a greater amount than that hereinbefore approved. On the same basis and for the same reasons we find, therefore, that there is no equity over and

ized company, must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future." 230 I.C.C. Rep., p. 61, 87.

The capital structure, existing claims and distribution of securities of the reorganized company are contained in the summarization of the Commission plan hereinbefore set forth. The reported and adjusted earnings of the Debtor appearing in the stipulation of facts are as follows:

above the securities hereinbefore approved; and that the equity of the existing stock has no value, and hence holders of such stock are not entitled to participate in the plan." (Original Report, p. 100, 101.)

The following extract is from the Commission's supplemental report, 233 I.C.C. 409, 413:

"In our prior report we stated that the entire capital structure of the reorganized company must be realistically related to its actual earning power, and that in determining such capital structure consideration should be given to the investment in the property only to the extent that such investment should be justified by the probable earnings reasonably foreseeable for the future if the reorganization was to be successful. With these considerations in mind, and for the reasons there set forth, and upon consideration of the investment of the debtor in its property, the probable rate-making value thereof, and its traffic and earnings, we conclude that we cannot approve the total capital structure under the Credit Corporation's proposed modification." [1217]

Earnings Available for Interest

Year	Reported	A. Adjusted
1922	\$2,306,124	\$2,404,890
1923	3,313,976	4,412,234
1924	3,144,124	3,241,823
1925	4,454,352	4,557,798
1926	4,759,282	4,868,390
1927	2,674,494	3,470,861
1928	2,964,371	4,376,972
1929	2,529,846	3,718,436
1930	1,552,487	2,381,529
1931	186,708 (D)	220,494 (D)
1932	252,706	283,912
1933	674,007	474,365
1934	1,084,244	1,396,353
1935	805,589	1,377,026
1936	181,102	1,901,423
1937	903,113 (D)	1,077,407
1938	1,243,916 (D)	225,431
1939 (first ten months)	1,061,883	1,174,717

(D)—Deficit.

The capitalization permitted by these earnings is a mere matter of computation,¹³ which will dem-

(13) The following results of computation are taken [1218] from the brief of the Institutional Bondholders for purposes of illustration: The earnings of the Debtor's system, as adjusted for the five years 1934 to 1938, inclusive, averaged \$1,195,528; for the ten years 1929 to 1938, inclusive, \$1,261,539; and for the seventeen years 1922 to 1938, inclusive, \$2,350,000. If such average earnings be capitalized at 5% the capitalization based on earnings for the 1934-1938 period would amount to \$23,910,560; for the 1929-1938 period to \$25,230,780, and for the 1922-1938 period to \$47,000,000. Each such capitalization is substantially less than the \$65,819,422 of senior par value securities provided for in the Commission plan.

onstrate that the Commission did not act arbitrarily in limiting capitalization nor the respective classes thereof.

In its original report the Commission, with the aid of its financial experts, has fully analyzed and

In order to permit a capitalization equal in amount only to the \$65,819,422 par value of senior securities contemplated by the Commission plan (thus disregarding entirely the no par value common stock) the 1934-1938 average earnings would have to be capitalized on a 1.81% basis; the 1929-1938 average earnings on a 2.00% basis; the 1922-1938 average earnings on a 3.57% basis; and the 1939 adjusted earnings on a 2.34% basis.

The average system earnings for the five years ending December 31, 1938, were insufficient by \$753,432 to cover the total charges through interest on the new income mortgage bonds, and by \$2,452,142 to cover the charges through dividends on the new preferred stock, under the Commission plan.

The average earnings for the ten year period ending December 31, 1938, were insufficient by \$687,521 to cover the total charges through the interest on the new income mortgage bonds, and by \$2,386,131 to cover the charges through dividends on the new preferred stock, under the Commission plan.

The average system earnings for the seventeen year period ending December 31, 1938, were sufficient to cover the total charges through interest on the new income mortgage bonds under the Commission plan, with \$400,940 to spare, but were insufficient by \$1,297,670 to cover the charges through the dividends on the new preferred stock.

The system earnings for the year 1939, as adjusted, were insufficient by \$409,200 to cover the total charges through interest on the new income mortgage bonds, and by \$2,107,810 to cover the charges through dividends on the new preferred stock. [1219]

discussed the traffic and revenue of the Debtor and its subsidiaries, also its earnings available for charges. The Commission closes its discussion of the latter subject with the statement: "A consideration of these recent data (reported subsequent to the preparation of the Debtor's estimate), together with other data of record, convinces us that too great reliance may not be placed upon the Debtor's estimate of future earnings, and that the capital structure of the reorganized company must be conservative." And again: "It is obvious, therefore, that based upon the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation."

It is objected that without a finding of insolvency in the bankruptcy sense, the provision of the Commission plan excluding stockholders from participation in the reorganization is invalid and inequitable and contrary to the law of the land. The statute makes no such requirement. Subsection (e) of 77 provides for the following five alternatives: "That at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or that the

interest of such class of stockholders will not be adversely and materially affected by the plan, or that the debtor has, pursuant to authorized corporate [1220] action, accepted the plan and its stockholders are bound by such acceptance." [Italics supplied.]

The Commission's finding that the equity of certain stockholders was without value, is based upon the second alternative. In *in re 620 Church Street Building Corp.*, 299 U. S. 24, a ruling in a reorganization case, under section 77B, excluding creditors and stockholders upon a finding that their claims had "no value", was sustained.

In *Consolidated Rock Products Co., et al. vs. E. Blois Du Bois*,¹⁴ a reorganization case under section 77B of the Bankruptcy Act (containing in some of its provisions terms identical with those in section 77), the Circuit Court of Appeals, for the Ninth Circuit, used the following language which is applicable here:

"* * * A corporation may come within the terms of §77B although it is not insolvent, but 'unable to meet its debts as they mature'. *Continental Bank v. Rock Island Ry.*, 294 U. S. 648, 672. The statute requires a proposed plan to be 'fair and equitable' regardless of the condition of the corporation, whether it be solvent or insolvent. The statute does not limit the test, 'fair and equitable', to plans of

(14) Case No. 9000, decided June 19, 1940.
[1221]

reorganization of insolvent corporations, but lays down the requirement that a plan must be 'fair and equitable' for all corporations seeking relief under §77B. We think a proposed plan of reorganization under §77B must be 'fair and equitable', whether the corporation sought to be reorganized is solvent or insolvent.

* * * * *

“Considerable argument is made to the effect that the debtor's preferred stockholders are forgotten men; that they lose 96% of their investment; and that they have an equity and must be given an interest in any plan of reorganization. We are not impressed by this argument. When a person buys a bond, he obtains it on the theory that he is not an owner but a creditor. When a person buys stock, common or preferred, he knows that he is buying an interest in the corporation which is subordinate to claims of the corporate creditors. He runs the risk of having an interest in something that is valueless.”

The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and

not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court. However, since these private property rights had not been adjudicated, it became the duty of the Commission to determine them preliminarily for the purpose of considering the plans

[1222]

before it, 230 I. C. C. 61, 97. Without such consideration and determination, it would have been impossible for the Commission to have complied with the statute and certified a plan to the court. While the decision of the Commission in the premises is advisory only, it was of inestimable value to the court in enabling it to see the whole picture and arrive at a decision. In this connection I wish to say that I have read the record and carefully considered all of the objections offered by the respective objectors to the Commission plan. I have also read the briefs of respective counsel in support of the objections. I am wholly in accord with the conclusions reached by the Commission upon both issues and all matters incidentally related thereto. It seems to me that further discussion would be superfluous. Every question presented by the objections was considered and passed upon by the Commission as shown by its original and supplemental reports. Objections to the administration or execution of the Commission plan are without merit and will be overruled.

Petitions for allowance for compensation for services rendered and for expenses (including reasonable counsel fees) incurred, in connection with the proceeding and plan of reorganization up to and including October 31, 1939, were filed by the following persons, corporations, and committees: the Debtor and its counsel; The Institutional Bondholders Committee and its counsel; Crocker First National Bank of San Francisco as Corporate Trustee under the First Mortgage and Samuel Armstrong as Individual [1223] Trustee under the First Mortgage; The Chase National Bank of the City of New York, as Trustee (until November 13, 1936) under the Refunding Mortgage; Irving Trust Company, as successor Trustee under the Refunding Mortgage; A. C. James Co. and its counsel; and Reconstruction Finance Corporation. Said petitions were referred under the provisions of the Act to the Commission to fix the maximum limits of final allowances. The Commission filed in this court on June 1, 1940, a certified copy of its report and order fixing the maximum limits for allowances for fees and expenses. The matter came on regularly for hearing before the court on August 5, 1940. Counsel for A. C. James Co. moved that the court postpone the consideration of allowances, other than certain ad interim administration expenses. The motion will be denied. The Irving Trust Company, as successor Trustee under the general and refunding mortgage, moved (1) for payment out of the general estate of the Debtor of the compensation

and expenses of itself and its counsel in the maximum limits fixed by the Commission, and (2) for payment of the balance of reasonable compensation of the Trustee and its counsel out of the cash held by said Trustee. The motion was based upon the contention that the allowances made were unreasonably low and that "it is not entirely clear whether or not the Commission intended to fix maximum limits of compensation payable out of the general estate for *all* services of the Trustee and its attorneys." An examination of the report and order of the Commission shows that in no case did the Commission allow as a maximum the amount

[1224]

claimed for compensation. All claims appear to have been treated upon a comparative basis. And it further appears from the report that allowances were made for all services rendered. The motion will be denied. I am of the opinion that the amounts allowed by the Commission as compensation for services rendered and for actual and reasonable expenses (including attorneys' fees) incurred are reasonable, and they will be approved.

Upon a consideration of the entire record I am of the opinion that the Commission plan complies with the provisions of subsection (b) of section 77 and is supported by the evidence; that it is fair and equitable; that it affords due recognition to the rights of each class of creditors and stockholders; that it does not discriminate unfairly in favor of any class of creditors or stockholders; that it

will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and that it provides for payment of all costs of administration and other allowances made or to be made by this court.

All objections to the Commission plan will therefore be overruled and the plan will be approved in toto.

Dated: August 15, 1940.

[Endorsed]: Filed Aug 15-1940. [1225]

In the Southern Division of the United States District Court for the Northern District of California.

No. 26591-S

In the Matter of

The Western Pacific Railroad Company,

Debtor.

ORDER APPROVING PLAN OF REORGANIZATION FOR DEBTOR

These proceedings coming on for hearing on the modified plan of reorganization for the Debtor, approved by the Interstate Commerce Commission in its Report and Order entered June 21, 1939, and certified to this Court by said Commission on September 28, 1939, together with a transcript of [1226] the proceedings before said Commission and

a copy of its said Report and Order approving said modified plan, and the Court having considered the entire record in these proceedings, including the transcript of the proceedings before said Commission certified to this Court and the evidence adduced and arguments presented at the hearing before this Court on January 22 to 25, 1940, and the Court having heretofore on August 15, 1940, filed its opinion herein,

The Court finds:

1. The findings of fact made by the Interstate Commerce Commission in its Original Report of October 10, 1938, as modified by its Supplemental Report of June 21, 1939, are supported by the evidence, and as supplemented by the stipulation of the parties filed herein on December 20, 1939, are adopted as findings by this Court.

2. The Plan of Reorganization, approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939:

- (a) Includes provisions modifying and altering the rights of creditors of the Debtor:

- (b) Provides for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property, in light of its earnings experience and all other relevant facts, there should be adequate coverage of such fixed charges by the probable earnings available for the payment thereof;

(c) Provides adequate means for the execution [1227] of the Plan; and

(d) In all other respects complies with the provisions of Subsection (b) of Section 77.

3. Said Plan of Reorganization:

(a) Is fair and equitable;

(b) Affords due recognition to the rights of each class of creditors and stockholders;

(c) Does not discriminate unfairly in favor of any class of creditors or stockholders;

(d) Will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and

(e) Provides for payment of all costs of administration and all other allowances made or to be made by this Court.

4. By order entered August 15, 1940, this Court fixed the amount to be paid by the Debtor, or any corporation acquiring its assets, for fees and expenses incident to the reorganization through October 31, 1939. Said amounts are reasonable and within maximum limits heretofore fixed by the Interstate Commerce Commission and said order constitutes full disclosure of the approximate amounts to be paid by the Debtor, or such other corporation, for such fees and expenses so far as they could be ascertained at the date of said hearing before this Court on January 22 to 25, 1940. Such additional amount as may be required to be paid

by the Debtor or such other corporation for services performed and expenses incurred (including reasonable attorneys' fees) after October 31, 1939, in connection with the proceedings and plan of reorganization, and in connection with the carrying out of said plan, if the same is finally confirmed, [1228] cannot be ascertained at this time, but such amounts will be subject to the approval of this Court within maximum limits hereinafter to be fixed by the Interstate Commerce Commission.

5. By order entered August 20, 1935, this Court divided the creditors and stockholders of the Debtor into classes and the classes of creditors hereinafter referred to are those fixed by said order.

Wherefore, it is ordered:

First: The objections to the Plan of Reorganization approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939, and the claims for equitable treatment heretofore filed herein by or on behalf of the Debtor, the Institutional Bondholders Committee, the Trustee under the Debtor's General and Refunding Mortgage, A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation and The Western Realty Company are hereby severally overruled and denied.

Second: Said Plan of Reorganization is hereby in all respects approved.

Third: The findings made by the Interstate Commerce Commission that the interests of the following classes of creditors:

(a) The Debtor's equipment obligations to be assumed by the Reorganized Company, being classes 6, 7, 8 and 9;

(b) Claims against the Debtor entitled to priority over any mortgage of the Debtor, current liabilities and obligations incurred by the Trustees of the Debtor during this reorganization [1229] proceeding, and expenses of reorganization allowed by this Court within the maximum limits fixed by the Interstate Commerce Commission, which shall be paid in cash or assumed by the Reorganized Company, and which are unclassified;

(c) Executory contracts of the Debtor which have been affirmed or have not been disaffirmed by the Trustees of the Debtor and not terminating prior to the conclusion of this reorganization proceeding which are to be assumed by the Reorganized Company and which are unclassified;

(d) Executory contracts made by the Trustees of the Debtor with the approval of this Court which by their terms do not terminate at or prior to the conclusion of this reorganization proceeding, which are to be assumed by the Reorganized Company, and which are unclassified; and

(e) All taxes levied, assessed or accrued against the Debtor or its property or against any subsidiary and remaining unpaid at the date of the confirmation of the plan, which are to be assumed and paid by the Reorganized Company

with the same relative priority that they now have with respect to other obligations of the Debtor;

will not be adversely and materially affected by said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to any of such classes for acceptance or rejection.

Fourth: The finding of the Interstate Commerce Commission that, at the time of the finding, the interests of [1230] unsecured creditors of the Debtor and the equity of the holders of the Debtor's Preferred Stock and the Debtor's Common Stock have no value, and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the Debtor under said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection.

Fifth: The only classes of creditors to whom said Plan of Reorganization shall be submitted for acceptance or rejection are:

(a) Class (1)—holders of claims evidenced by The Western Pacific Railroad Company First Mortgage 5% Bonds due March 1, 1946, issued under the First Mortgage of The Western Pacific Railroad Company dated June 26, 1916, and the interest coupons appurtenant thereto;

(b) Class (3)—Debtor's secured promissory

notes issued to A. C. James Co., dated March 28, 1932, and May 31, 1932, respectively, bearing interest at the rate of 5% per annum and due March 28, 1935, and May 31, 1935, respectively, together with the accrued and unpaid interest thereon;

(c) Class (4)—Debtor's secured promissory notes to Reconstruction Finance Corporation, dated March 1, 1932, June 29, 1932, August 1, 1932, August 30, 1932, and March 25, 1933, respectively, bearing interest at the rate of 6% per annum, and due March 1, 1935, June 29, 1935, August 1, 1935, August 30, 1935, and March 25, 1936, respectively, [1231] together with accrued and unpaid interest thereon;

(d) Class (5)—Debtor's secured promissory notes to The Railroad Credit Corporation, dated June 29, 1932, and March 25, 1933, respectively, bearing interest at the rate provided for in the Marshalling and Distributing Plan, 1931, of The Railroad Credit Corporation, each note payable on demand, together with accrued and unpaid interest thereon.

Sixth: T. M. Schumacher and Sidney M. Ehrman, Trustees of the Debtor, be, and they are hereby directed to send a certified copy of this Order and a certified copy of the opinion of this Court filed herein on August 15, 1940, to the Interstate Commerce Commission for use in submitting said Plan of Reorganization hereby approved to the

holders of said claims and interests found to be entitled to vote thereon.

Dated: August 15, 1940.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Aug. 15, 1940. [1232]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California,

City and County of San Francisco—ss.

J. Francis Hoey, being duly sworn, deposes and says: That he is over twenty-one years of age; that he is an employee of Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, Crocker Building, San Francisco, California; that on August 22nd, 1940, he served the within Notice of Entry of Orders upon the [1233] following attorneys at law:

C. W. Dooling,

878 Mills Building,

San Francisco, California,

Attorney for Debtor.

Pillsbury, Madison & Sutro,

Standard Oil Building,

San Francisco, California,

Attorneys for Irving Trust Company, as Substituted Trustee under General and Refunded Mortgage.

Garret W. McEnerney and Andrew F. Burke,
2002 Hobart Building,
San Francisco, California,

Attorneys for A. C. James & Co.
Brobeck, Phleger & Harrison,
Crocker Building,
San Francisco, California,

Attorneys for Reconstruction Finance Corporation.

Sloss, Turner & Finney,
111 Sutter Street,
San Francisco, California,

Attorneys for Western Pacific Railroad Corporation.

Chickering & Gregory,
111 Sutter Street,
San Francisco, California,

Attorneys for Crocker First National Bank
of San Francisco and Samuel Armstrong,
Trustee of First Mortgage.

Pillsbury, Madison & Sutro,
Standard Oil Building,
San Francisco, California,

Attorneys for Chase National Bank of the
City of New York.

by delivering a copy of said Notice to said attorneys at their respective office addresses; and that he served a copy of the said Notice upon the following attorneys at law:

Edward G. Buckland,
Maryland Trust Building,

Baltimore, Maryland,

Attorney for The Railroad Credit Corporation.

LeRoy R. Goodrich,

1001 Bank of America Building,

Oakland, California,

Attorney for The Western Realty Company.

by depositing a copy of said Notice securely enclosed in a [1234] postpaid wrapper in the United States Post Office in San Francisco, California, directed to said Edward G. Buckland and LeRoy R. Goodrich at the above addresses.

J. FRANCIS HOEY.

Subscribed and sworn to before me this 22nd day of August, 1940.

[Seal]

W. W. HEALEY,

Notary Public

in and for the City and County of
San Francisco, State of California.

My Commission expires August 29, 1941. [1235]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDERS

To: The Western Pacific Railroad Company, Debtor, and to Messrs. Pierce & Greer and C. W. Dooling, Esq., its attorneys; Irving Trust Company, as Substituted Trustee under General and Refunding Mortgage, and Messrs. Pillsbury, Madison & Sutro and Messrs. Davies, Auerbach, Cornell & Hardy, its attorneys; A. C. James & Co., and Messrs. Witman, Ransom,

Coulson & Goetz and Garret W. McEnerney and Andrew F. Burke, its attorneys; Reconstruction Finance Corporation, and C. M. Clay, Esq., Florence de Hass Dembitz, Esq., and Messrs. Brobeck, Phleger & Harrison, its attorneys; The Railroad Credit Corporation, and Edward G. Buckland, Esq., its attorney; Western Pacific Railroad Corporation, and Messrs. Sloss, Turner & Finney, its attorneys; The Western Realty Company, and LeRoy R. Goodrich, Esq., its attorney; Crocker First National Bank of San Francisco and Samuel Armstrong, Trustee of First Mortgage, and Messrs. Chickering & Gregory and Messrs. Milbank, Tweed & Hope, their attorneys; and Chase National Bank of the City of New York, and Messrs. Pillsbury, Madison & Sutro and Messrs. Milbank, Tweed & [1236] Hope, its attorneys:

You and each of you will please take notice that on August 15, 1940, there were regularly made in the above entitled cause by the Honorable A. F. St. Sure, United States District Judge, and on said date regularly entered in said cause, the following entitled orders:

(1) Order granting leave to Bankers Trust Company, Trustee, to file a claim against The Western Pacific Railroad Company;

(2) Order approving plan of reorganization for Debtor; and

(3) Order making allowances to various parties in interest for fees and expenses.

Dated: San Francisco, August 22, 1940.

MORRISON, HOHFELD,
FOERSTER, SHUMAN &
CLARK.

CRAVATH, deGERSDORFF,
SWAINE & WOOD,

Attorneys for Frederick H. Ecker,
John W. Stedman and Reeve
Schley, Committee representing
a group of holders of First
Mortgage Bonds.

[Endorsed]: Filed Aug. 22, 1940. [1237]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER AP-
PROVING PLAN OF REORGANIZATION
OF DEBTOR.

Notice Is Hereby Given that A. C. James Co., a corporation, a secured creditor of the above named debtor, which has heretofore, by order of Court been granted leave to intervene, for all purposes, in the above entitled proceeding, and constituted a general party therein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the above entitled Court, "Approving Plan of Reorganization of Debtor", which was made, filed and entered in the above en-

titled proceeding on August 15, 1940, and from each and every part of said order.

Dated: September 20, 1940.

WHITMAN, RANSOM,
COULSON & GOETZ
GARRET W. McENERNEY
ANDREW F. BURKE

Attorneys for Appellant, A. C. James Co.

[Endorsed]: Filed Sept 20-1940. [1238]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER APPROVING PLAN OF REORGANIZATION OF DEBTOR

Notice is hereby given that The Western Pacific Railroad Corporation, a corporation, one of the intervenors in the above entitled proceeding, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the above entitled Court, Approving Plan of Reorganization of Debtor, made, filed and entered in the above entitled proceeding on August 15, 1940, and from each and every part of said order.

Dated: September 20, 1940

M. C. SLOSS
SLOSS & TURNER

Attorneys for Appellant,
The Western Pacific Railroad
Corporation

[Endorsed]: Filed September 20, 1940. [1239]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER CONFIRMING PLAN OF REORGANIZATION

Sirs:

Please Take Notice that The Railroad Credit Corporation, a secured creditor of the above-named debtor, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from an order entered in the above-entitled proceeding in the office of the Clerk of the United States District Court for the Northern District of California, Southern Division, on the 15th day of August 1940, approving and confirming a plan of reorganization of the debtor, and from each and every part of said order.

September 20, 1940.

Yours truly,

WM. J. KANE

EDWARD G. BUCKLAND

704 Maryland Trust Building
Calvert and Redwood Streets
Baltimore, Maryland

Attorneys for The Railroad Credit Corporation

To:

Pierce & Greer Esqs.

40 Wall Street

New York, New York

C. W. Dooling Esq.

878 Mills Building

San Francisco, California

Attorneys for Debtor, [1240]

Cravath, de Gersdorff, Swaine & Wood Esqs.

15 Broad Street

New York, New York

Morrison, Hohfeld, Foerster, Shuman & Clark Esqs.

Crocker Building

San Francisco, California

Attorneys for Institutional Bondholders

Committee.

Pillsbury, Madison & Sutro Esqs.

Standard Oil Building

San Francisco, California.

Davies, Auerbach, Cornell & Hardy Esqs.

1 Wall Street

New York, New York

Attorneys for Irving Trust Company, as

Substituted Trustee under General and

Refunding Mortgage.

C. M. Clay Esq.

1325 H. Street, N. W.

Washington, D. C.

Brobeck, Phleger & Harrison Esqs.

Crocker Building

San Francisco, California

Attorneys for Reconstruction Finance Corporation.

Garret W. McEnerney and Andrew F. Burke

2002 Hobart Building

San Francisco, California

Whitman, Ransom, Coulson & Goetz

40 Wall Street

New York, New York

Attorneys for A. C. James Co.

Sloss & Turner Esqs.

111 Sutter Street

San Francisco, California

Attorneys for Western Pacific Railroad
Corporation.

Leroy R. Goodrich Esq.

1001 Bank of America Building

Oakland, California

Attorney for The Western Realty Company.

Chickering & Gregory Esqs.

111 Sutter Street

San Francisco, California

Milbank, Tweed & Hope Esqs.

15 Broad Street

New York, New York

Attorneys for Crocker First National Bank of
San Francisco and Samuel Armstrong, Trustee
of First Mortgage.

Pillsbury, Madison & Sutro Esqs.

Standard Oil Building

San Francisco, California

Milbank, Tweed & Hope Esqs.

15 Broad Street

New York, New York

Attorneys for Chase National Bank of the City
of New York.

Thomas, Beedy & Paramore,

315 Montgomery Street,

San Francisco, California.

Attorneys for Bankers Trust Company, Trustee.

[Endorsed]: Filed Sept 20-1940. [1241]

[Title of District Court and Cause.]

**NOTICE OF APPEAL OF DEBTOR FROM
ORDER APPROVING PLAN OF REOR-
GANIZATION OF DEBTOR.**

Notice Is Hereby Given that The Western Pacific Railroad Company, a corporation, Debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled Court approving plan of reorganization of debtor which was made, filed and entered in the above entitled proceeding on August 15, 1940, and from each and every part of said order.

Dated, September 20, 1940.

PIERCE & GREER

C. W. DOOLING

Attorneys for Debtor and Appellant The Western Pacific Railroad Company.

[Endorsed]: Filed Sept 20-1940. [1242]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Irving Trust Company, as [1243] substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from so much of the order of this Court made and entered

August 15, 1940, as overrules and denies the objections filed herein by Irving Trust Company, as Trustee as aforesaid, to the Plan of Reorganization approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939, and the claims for equitable treatment filed herein by Irving Trust Company, as Trustee as aforesaid, and from so much of said order as, contrary to the aforesaid objections and claims for equitable treatment, approves in all respects said Plan of Reorganization.

Dated: September 20, 1940.

FELIX T. SMITH

Standard Oil Building

San Francisco, California

Attorney for Irving Trust Company, as Trustee
aforesaid, Appellant.

PILLSBURY, MADISON & SUTRO

Standard Oil Building

San Francisco, California

DAVIES, AUERBACH, CORNELL & HARDY

One Wall Street,

New York,

Of Counsel.

[Endorsed]: Filed Sept 20-1940. [1244]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANTS, THE WESTERN PACIFIC RAILROAD COMPANY, THE WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, AND IRVING TRUST COMPANY AS TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY DATED JANUARY 1, 1932, OF THE PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL.

The Western Pacific Railroad Company, debtor herein, The Western Pacific Railroad Corporation, A. C. James Co., a corporation, The Railroad Credit Corporation and Irving Trust Company as Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, dated January 1, 1932, have appealed severally to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the above entitled Court approving a plan of reorganization of the debtor, which order was made and filed in the above proceeding on August 15, 1940, and hereby jointly and severally designate the following as the portions of the record, proceedings and evidence to be contained in the record on appeal herein; such designations are made in conformity with Rule 75 (a) of the Rules of Civil Procedure: [1257]

(1) The petition of The Western Pacific Rail-

road Company, debtor, filed herein on August 2, 1935, pursuant to Subdivision (a) of Section 77 of the Bankruptcy Act as amended.

(2) Order of the above entitled Court approving such petition filed August 2, 1935, and restraining the sale, conversion or other disposition of collateral.

(3) Petition for order respecting the filing of claims and division of creditors and stockholders into classes, filed August 20, 1935.

(4) Order dividing claims into classes, filed August 20, 1935.

(5) Petition for appointment of trustees and order respecting notice of hearing of said petition, filed August 31, 1935.

(6) Claim of A. C. James Co., filed herein September 10, 1935.

(7) Claim of The Western Pacific Railroad Corporation, filed September 12, 1935.

(8) Claim of Western Realty Company, filed September 13, 1935.

(9) Claim of Railroad Credit Corporation, filed on or before September 15, 1935.

(10) Claim filed on behalf of holders or pledgees of General and Refunding Mortgage Bonds, on or before September 15, 1935. [1258]

(11) Order appointing trustees, filed September 23, 1935.

(12) Order of September 30, 1935, modifying order appointing trustees.

(13) Proposed plan of reorganization filed by the debtor February 8, 1936, being Exhibit "1" of

the exhibits introduced at the hearings before the Interstate Commerce Commission.

(14) Plan of Reorganization filed with the Interstate Commerce Commission on behalf of the Committee representing Institutional Bondholders on September 28, 1936, being Interstate Commerce Commission Exhibit No. "42".

(15) Plan of Reorganization filed with the Interstate Commerce Commission on behalf of A. C. James Co. on October 26, 1936, being Interstate Commerce Commission Exhibit No. "76".

(16) Transcript of the hearings and proceedings before the Interstate Commerce Commission in this matter, which is numbered "Finance Docket No. 10913", and has heretofore been certified to and filed in the above named Court, including the transcript of all proceedings before the Commission or any of its Bureaus or Divisions, together with the remainder of the 126 exhibits (in addition to those specified in items (13), (14) and (15) above), introduced before said Commission and its Bureaus and Divisions.

(17) The proposed report of the Bureau of [1259] Finance of the Commission dated August 2, 1937.

(18) The report and order of the Commission dated October 10, 1938.

(19) The order of the Commission granting a rehearing dated December 30, 1938.

(20) The final modifying report and order of the Commission dated June 21, 1939. Two copies

of all of the Reporter's Transcript of the hearings are filed herewith pursuant to Rule 75(b) of the Rules of Civil Procedure.

(21) Petition of A. C. James Co. for leave to intervene before the Commission dated April 18, 1936.

(22) Petition of Railroad Credit Corporation for leave to intervene before the Commission dated March 14, 1936.

(23) Petition of Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor, for leave to intervene before the Commission dated November 19, 1936.

(24) Exceptions of the several parties to the aforesaid proposed report of the Bureau of Finance.

(25) Petitions of the several parties filed with the Commission on December 9, 1938, for rehearing and modification of the report and order of the Commission dated October 10, 1938.

(26) The debtor's petition, dated August 1, 1939, for rehearing and modification of the Commission's report and order of June 21, 1939. [1260]

(27) The Commission's order of September 19, 1939, denying debtor's petition of August 1, 1939, for rehearing and modification.

(28) Order of the Court made November 8, 1939, fixing the time within which objections to the Plan of Reorganization and claims for equitable treatment might be filed, and designating December 8, 1939, as the date for filing such objections and claims.

(29) Petition for leave to file petition of intervention of A. C. James Co. and order granting such petition, both filed December 1, 1939, petition of intervention of A. C. James Co. for leave to intervene and order made and filed, December 1, 1939, fixing time and place for hearing such petition, notice of filing petition of intervention of A. C. James Co. and order granting petition of intervention of A. C. James Co. made and filed December 4, 1939, and notice of making and entry of said order.

(30) Petition for leave to file petition of intervention of The Western Pacific Railroad Corporation and order granting such petition and fixing date of hearing upon petition of intervention, both filed December 7, 1939, petition of intervention of Western Pacific Railroad Corporation and notice of filing same, both dated December 7, 1939 and order granting petition of intervention, dated December 11, 1939, and notice of making and entry of said order.

(31) Petitions, orders and notices relating to [1261] intervention of Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor in this proceeding.

(32) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by A. C. James Co. on December 8, 1939.

(33) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by The Western Pacific Railroad Corporation on December 8, 1939.

(34) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by Railroad Credit Corporation on December 8, 1939.

(35) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by The Western Pacific Railroad Company on December 8, 1939.

(36) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor on December 8, 1939.

(37) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by Western Realty Company on December 8, 1939.

(38) Stipulation as to facts not in dispute filed herein on December 20, 1939, and order of the Court made and filed December 20, 1939, making said stipulation a part of the record.

(39) Summary of issues remaining for decision by [1262] the Court, filed herein by The Western Pacific Railroad Corporation and A. C. James Co. on December 20, 1939.

(40) Summary of issues as stated by counsel for Institutional Bondholders Committee, filed herein on December 20, 1939.

(41) Order of the Court fixing January 22, 1940, as date for hearing parties in interest, providing for notice, etc. filed December 21, 1939.

(42) Order of the Court made and filed December 29, 1939, relative to issues raised by objections to the Commission Plan.

(43) Transcript of the evidence and proceedings (other than the arguments of counsel), had and taken in the above entitled Court on January 22, 1940, and all exhibits received in evidence on said hearing. Two copies of said transcript are filed with these designations, pursuant to Rule 75(b) of the Rules of Civil Procedure.

(44) Opinion of the Court upon approval of plan of reorganization dated and filed August 15, 1940.

(45) Order of the Court overruling all objections and approving plan of reorganization, filed August 15, 1940.

(46) Notice of entry of order of the above entitled Court overruling objections and approving plan of reorganization and affidavit of service of said notice, filed August 22, 1940.

(47) Notice of appeal from the aforesaid order [1263] of August 15, 1940, filed by A. C. James Co. on September 20, 1940.

(48) Notice of appeal from the aforesaid order of August 15, 1940, filed by The Western Pacific Railroad Corporation on September 20, 1940.

(49) Notice of appeal from the aforesaid order of August 15, 1940, filed by Railroad Credit Corporation on September 20, 1940.

(50) Notice of appeal from the aforesaid order of August 15, 1940, filed by The Western Pacific Railroad Company, debtor herein, on September 20, 1940.

(51) Notice of appeal from the aforesaid order of August 15, 1940, filed by Irving Trust Company

as Trustee under the General and Refunding Mortgage of the debtor on September 20, 1940.

(52) Notice from the Clerk of the Court of the filing of the aforesaid notices of appeal.

(53) Bonds for costs on appeal filed on September 20, 1940, by A. C. James Co., The Western Pacific Railroad Company, The Western Pacific Railroad Corporation, Railroad Credit Corporation and Irving Trust Company, pursuant to Rule 73(c) of the Rules of Civil Procedure.

(54) A copy of this designation.

(55) Statement of points on which The Western Pacific Railroad Company intends to rely on its appeal.

(56) Statement of points on which A. C. James Co. intends to rely on its appeal. [1264]

(57) Statement of points on which The Western Pacific Railroad Corporation intends to rely on its appeal.

(58) Statement of points on which the Railroad Credit Corporation intends to rely on its appeal.

(59) Statement of points on which Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor intends to rely on its appeal.

(60) All certificates made by the Clerk of the above named Court with reference to the proceedings, rulings and orders of the Court hereinbefore mentioned.

(61) All endorsements of filings and all acknowledgments and other proofs of service of any of the aforesaid records or papers in the above

named Court, or, in lieu thereof, memoranda by the Clerk showing the due filing and/or service of said records or papers.

Dated, October 8, 1940.

PIERCE & GREER

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pany

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Attorneys for Appellant, Irving
Trust Company as Trustee un-
der the General and Refunding
Mortgage of the Debtor

[Endorsed]: Filed Oct 10-1940. [1265]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT, A. C. JAMES CO., WILL
RELY ON ITS APPEAL FROM THE OR-
DER OF THE ABOVE COURT MADE
AUGUST 15, 1940, APPROVED PLAN OF
REORGANIZATION OF DEBTOR.

A. C. James Co., a corporation which has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above mentioned Court made August 15, 1940, approving a plan of reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal:

1. The District Court has erred in approving a plan of reorganization which is unfair and inequitable, fails to afford due recognition to the rights of A. C. James Co. as a secured creditor in relation to the value of the assets of the debtor; discriminates unfairly against the A. C. James Co. in relation to other secured creditors; does not conform to the requirements of the law of the land regarding the participation of A. C. James Co., as a secured creditor, and is confiscatory of private property rights of A. C. James Co., in violation of the Fifth [1266] Amendment of the Constitution, the provisions of which A. C. James Co. hereby invokes.

2. The District Court has erred in approving said plan of reorganization in that it has adopted a theory and concept of the functions of the Court

in approving or disapproving a plan of reorganization, which theory and concept are without support in the law and permeate and vitiate the approval by the Court; the District Court has not exercised an independent and informed judgment in approving the plan, as is required by Section 77 of the Bankruptcy Act and the law of the land, but has merely reviewed the findings and determinations of the Interstate Commerce Commission.

3. The District Court has erred in approving a plan of reorganization which was not proposed by the debtor or any other party to the proceeding but was framed by the Commission upon the erroneous theory that the Commission was empowered under Section 77 of the Bankruptcy Act to limit the capitalization of the reorganized company solely on the basis of an estimate of probable prospective earnings in order to assure a material return on its capital stock, without giving effect to the investment in and value of the debtor's property.

4. The District Court has erred in holding that the determination of the amount and character of the capitalization of the reorganized company is a legislative function affecting the public interest and exclusively within the province of the Commission; the Commission's assumption of power to limit the capitalization of the [1267] reorganized company, and the acquiescence of the District Court in such assumption, are unwarranted and contrary to law, and result in the confiscation of private property rights in violation of the Fifth Amendment to the Constitution.

5. The limitation on capitalization fixed in the plan approved by the District Court does not constitute a valuation or appraisal of the debtor's property, such as is required by Section 77 of the Bankruptcy Act and the law of the land.

6. Neither the District Court nor the Commission made such a precise finding as to the value of the property of the debtor as is necessary to sustain the disregard of a substantial portion of the claim of the A. C. James Co., as contemplated in the plan approved by the District Court.

7. The District Court has erred in approving a plan which does not give "Such effect * * * to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts." The drastic limitation upon the capitalization of the debtor which is imposed by the Interstate Commerce Commission in the plan certified by it disregards completely the investment in the property of the debtor and the value thereof as heretofore found and reported by the Commission, and without any new appraisal or valuation of such property by the Interstate Commerce Commission; the capitalization of a debtor in reorganization cannot lawfully be determined [1268] or limited below the amount proposed by the parties to the proceeding unless such determination is made with reference to the investment in the debtor's property and the value

thereof as disclosed by an appraisal or valuation.

8. The determinations and findings of the Interstate Commerce Commission as to the probable earnings and earning power of the debtor's property, the limitation upon total capitalization and the resulting delimitation of private property rights were made arbitrarily, in disregard of the evidence and in violation of the meaning and intent of Section 77 of the Bankruptcy Act; if Section 77 is interpreted as authorizing such findings and determinations by the Commission, or as conferring upon the Commission plenary and exclusive power to so limit the capitalization of the debtor upon reorganization, then Section 77 is unconstitutional and void as in violation of the Fifth Amendment of the Constitution, the provisions of which A. C. James Co. hereby invokes.

9. The District Court has erred in approving a plan which arbitrarily disregards and denies recognition to a substantial proportion of the secured claim of A. C. James Co., while, according to the other secured creditors (Reconstruction Finance Corporation and Railroad Credit Corporation), preferential treatment which is unfair, inequitable and discriminatory as against the A. C. James Co., and contrary to the law of the land; the preferential treatment granted in the plan to Reconstruction Finance Corporation in respect of its claim as a secured creditor, to [1269] compensate such corporation for its agreement to accept First Mortgage Bonds of the reorganized company in

exchange for the Trustees' Certificates which it now holds, is unjust and contrary to law.

10. The plan of reorganization approved by the District Court is unfair, inequitable and discriminatory in attempting to preserve to other secured creditors full rights in collateral for the obligations of the debtor furnished by a third party at the same time it completely refunds the obligations of the debtor held by such secured creditors, and disregards and fails to fund a substantial portion of the secured claim held by A. C. James Co.

11. The District Court has erred in approving a plan of reorganization which adjudicates, delimits and destroys the property rights of A. C. James Co. without a judicial determination of the facts and issues necessary to an adjudication and delimitation of private property rights in violation of Section 77 of the Bankruptcy Act, the law of the land and the Fifth Amendment of the Constitution.

12. The District Court has erred in approving a plan of reorganization which fails to recognize that a reorganization under Section 77 of the Bankruptcy Act is a statutory alternative to liquidation and forced sale of the debtor's assets and fails to recognize the statutory intent that the value of the debtor's assets shall for the purposes of a reorganization be the fair going concern value and not forced sale value or the market value of the debtor's securities. [1270]

13. The District Court erred in finding that the.

secured claim of A. C. James Co. is not fully secured by the lien of the debtor's General and Refunding Mortgage, and in disregarding a large part of said claim.

14. The plan approved by the District Court discriminates against A. C. James Co. unfairly and unlawfully, in that it affords less favorable treatment to A. C. James Co. than to any other secured creditor, notwithstanding that the claim of said A. C. James Co. is deserving of more favorable equitable treatment for the reasons, among others:

(a) That it resulted from cash advances made by A. C. James Co. to the debtor, during 1931 and 1932, the depth of the financial depression from which the railroads of the country have suffered, to enable the debtor to complete its Northern California Extension which completion was essential to protect the interest of all investors in the property, and has been an important factor in the earning power of the debtor; and

(b) That the advances made during 1931 and 1932 by said A. C. James Co. to the debtor, were made with the express approval of the Interstate Commerce Commission which found the necessary issue of securities by the debtor to represent such advances to be "compatible with the public interest," even though the then earnings status of the debtor was substantially less favorable than at the time the Commission formu-

lated and [1271] promulgated the plan approved by the Court, or at the present time.

15. The District Court erred in approving the allocation, as proposed in the plan, of common stock without par value of the reorganized company, apparently valued by the Commission at \$100 per share for the purpose of capitalization, to First Mortgage bondholders, and the Reconstruction Finance Corporation at \$57 a share, to Railroad Credit Corporation at \$62 a share, and to A. C. James Co. (if it should be urged that the entire debt of the A. C. James Co. is thereby refunded) at approximately \$155 a share, in violation of Section 77 of the Bankruptcy Act and the law of the land.

16. The findings of the Commission and the above Court, that the claim of A. C. James Co. has no value in excess of that recognized by the Commission and the provisions of the plan which give effect to such findings, are, and each of them is unsupported by and contrary to the evidence.

17. The District Court erred in holding that Section 77 of the Bankruptcy Act authorizes or permits the exclusion from participation in the reorganization of part of the secured claim of A. C. James Co. without a finding that the debtor was insolvent in the bankruptcy sense.

18. The District Court erred in approving a plan of reorganization which provides for the issue of common stock of the reorganized company to holders of First Mortgage Bonds of the debtor and

to secured creditors, [1272] in respect of many millions of dollars of interest accrued on the bonds and secured notes of the debtor after the filing of the debtor's petition on August 2, 1935, whereas under Section 77 of the Bankruptcy Act and the law of the land the rights and liabilities of creditors and of all persons with respect to the debtor and its property were fixed as of the date of filing said petition; the plan approved by the District Court cannot be supported in law in so far as it provides for an effective date thereof of January 1, 1939, and not August 2, 1935, as contemplated by Section 77 of the Bankruptcy Act.

19. The District Court erred in approving a plan of reorganization which imposes arbitrary limitations upon the functions of the management of the reorganized company, contemplated by said plan, through the provision for a mandatory rather than a discretionary capital fund.

20. The aforesaid order of August 15, 1940, approving the plan and overruling the objections of A. C. James Co. and other parties is erroneous upon each and all of the grounds hereinbefore specified.

Dated, October 9th, 1940.

WHITMAN, RANSOM,
COULSON & GOETZ,
GARRET W. McENERNEY,
ANDREW F. BURKE,

Attorneys for Appellant, A. C. James Co.

[Endorsed]: Filed Oct. 10, 1940. [1273]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT, THE WESTERN PACIFIC
RAILROAD CORPORATION, INTENDS
TO RELY ON THE APPEAL.

The Western Pacific Railroad Corporation, a corporation which has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above mentioned Court made August 15, 1940, approving a Plan of Reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal:

(1) The Plan of Reorganization approved by the Judge is not fair or equitable as to the appellant as owner of an unsecured claim. [1274]

(2) The Plan of Reorganization approved by the Judge is not fair or equitable as to the appellant as owner of all the capital stock, preferred and common, of the Debtor.

(3) The Plan of Reorganization approved by the Judge does not afford due recognition to the rights of unsecured creditors and particularly of the appellant as an unsecured creditor.

(4) The Plan of Reorganization approved by the Judge does not afford due recognition to the rights of appellant as sole stockholder of the Debtor.

(5) The Plan of Reorganization approved by the Judge does not conform to the requirements

of the law of the land regarding the participation of unsecured creditors and particularly of the appellant as an unsecured creditor:

(6) The Plan of Reorganization approved by the Judge does not conform to the requirements of the law of the land regarding the participation of the stockholders of the Debtor, and particularly of the appellant as the sole stockholder of the Debtor.

(7) The Plan of Reorganization, if made effective, would deprive the appellant of its property, i. e., its unsecured claim, without compensation, and without due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

(8) The Plan of Reorganization, if made effective, would deprive the appellant of its property, i. e., of its equity and interest in the property of the Debtor, as owner and holder of all of the capital stock of the Debtor, without compensation, and without due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

(9) The Plan of Reorganization approved by the Judge [1275] discriminates unfairly in favor of all classes of secured creditors and against the appellant as an unsecured creditor.

(10) The Plan of Reorganization approved by the Judge discriminates unfairly in favor of all classes of secured creditors and against the appellant as a stockholder of the Debtor, i. e., as the sole stockholder of the Debtor.

(11) The Plan of Reorganization approved by the Judge will not conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

(12) The finding of the Interstate Commerce Commission that, at the time of the finding, the interests of the unsecured creditors of the Debtor had no value is unsupported by the evidence.

(13) The finding of the Interstate Commerce Commission that at the time of the finding the equity of the holders of the Debtor's preferred stock and the Debtor's common stock had no value is unsupported by the evidence.

(14) The District Court and the Judge thereof erred in affirming the finding of the Interstate Commerce Commission that at the time of the finding the interests of unsecured creditors of the Debtor had no value.

(15) The District Court and the Judge thereof erred in affirming the finding of the Interstate Commerce Commission that at the time of the finding the equity of holders of the Debtor's preferred stock and the Debtor's common stock had no value.

(16) The District Court and the Judge thereof erred in holding and deciding that the Plan of Reorganization shall not be submitted to the unsecured creditors of the Debtor for acceptance or rejection. [1276]

(17) The District Court and the Judge thereof erred in holding that the Plan of Reorganization

shall not be submitted to the shareholders of the Debtor for acceptance or rejection.

(18) The evidence before the Interstate Commerce Commission and its findings, together with the evidence before the Court on the hearing of objections to the Commission's report, show that the value of the Debtor's property exceeded the aggregate amount of all claims which were given recognition in the Plan of Reorganization; there was therefore no justification under Section 77 of the Bankruptcy Act as amended, or under the law of the land, for denying participation to the holders of unsecured claims against the Debtor.

(19) The evidence before the Interstate Commerce Commission and its findings, together with the evidence before the Court on the hearing of objections to the Commission's report, show that the value of the Debtor's property exceeded the aggregate amount of all claims which were given recognition in the Plan of Reorganization, together with the amount of the unsecured claims against the Debtor. There was therefore no justification under Section 77 of the Bankruptcy Act as amended, or under the law of the land, for denying participation to the holders of the stock of the Debtor.

(20) The evidence before the Interstate Commerce Commission and the evidence before the District Court on the hearing of objections to the report of the Commission showed that the Debtor

was not and is not insolvent within the meaning of the term "insolvent", as defined in Section 1, of the Bankruptcy Act as amended.

(21) There was no finding by the Interstate Commerce Commission, or by the District Court or the Judge thereof, that [1277] the Debtor was insolvent within the meaning of the term "insolvent", as defined in Section 1, of the Bankruptcy Act as amended:

(22) Any implied finding, if such there was, by the Interstate Commerce Commission or by the District Court or the Judge thereof, that the Debtor was insolvent, as the term "insolvent" is defined in Section 1 of the Bankruptcy Act, as amended, was unsupported by the evidence before the Commission or the Court or the Judge thereof.

(23) The District Court and the Judge thereof erred in holding that Section 77 of the Bankruptcy Act as amended authorizes the exclusion of stockholders of the Debtor from participation in the reorganization even though the Debtor be not insolvent, and in holding that Section 77, as so interpreted, is not in violation of the law of the land.

(24) The Interstate Commerce Commission, in its report promulgating the Plan of Reorganization, and the District Court and the Judge thereof, in approving said Plan, proceeded in violation of Section 77 of the Bankruptcy Act as amended, and in violation of the law of the land in going upon the view that the only measure of value of the

Debtor's property was a capitalization of the net earnings of the Debtor over a past period.

(25) The Interstate Commerce Commission and the District Court and the Judge thereof erred in failing to give due consideration to the prospective earning power of the Debtor's property and in refusing to give any consideration to all or any other relevant facts.

(26) The Interstate Commerce Commission and the District Court and the Judge thereof erred in refusing to give any effect to the present cost of reproduction new and less depreciation of the property of the debtor or to the original [1278] cost of the property or to the actual investment therein.

(27) The District Court and the Judge thereof erred in failing to form or declare an informed, independent judgment on the question whether the Plan of Reorganization certified to it complies with the following requirements of subdivision (e) of Section 77 of the Bankruptcy Act as amended, or any of them; That the Plan be fair and equitable; that it afford due recognition to the rights of each class of creditors or stockholders; that it will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

(28) The District Court and the Judge thereof erred in failing to make an independent determination of the value of the Debtor's property in so far as such determination was an element in disposing of the appellant's contention that the Plan of Re-

organization, if carried into effect, would result in the confiscation of appellant's property, without due process of law, contrary to the Fifth Amendment to the Constitution of the United States.

(29) The District Court and the Judge thereof erred in holding that the Interstate Commerce Commission has plenary power, under Section 77 of the Bankruptcy Act as amended, to determine the amount and character of the capitalization of a reorganized railroad company.

(30) The District Court and the Judge thereof erred in holding that the determination of the amount and character of the capitalization of the reorganized debtor company is a legislative function affecting the public interest, and in holding that such determination is exclusively within the province of the Interstate Commerce Commission, subject only to the qualification that the Court shall independently determine whether, [1279] in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily.

Dated: October 8, 1940.

M. C. SLOSS,

SLOSS & TURNER

Attorneys for Appellant, The Western Pacific
Railroad Corporation.

[Endorsed]: Filed Oct. 10, 1940. [1280]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT, THE RAILROAD CREDIT
CORPORATION, WILL RELY ON ITS
APPEAL FROM THE ORDER OF THE
ABOVE COURT MADE AUGUST 15, 1940,
APPROVING PLAN OF REORGANIZA-
TION OF DEBTOR.

The Railroad Credit Corporation, which has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above mentioned Court made August 15, 1940, approving a plan of reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal:

1. The District Court has erred in approving a plan of reorganization which provides for an effective date that will be at least a year and ten months earlier than the actual effective date of a plan of reorganization without making adequate provision and adjustments for the application of proceeds and income from collateral, including the income from advances made by The Western Pacific Railroad Corporation to The Standard Realty & Development Company, or from any income that may be payable from other pledged securities. The rights of The Railroad Credit Corporation to apply income from and proceeds of collateral exist by virtue of the general law of pledges and the guarantee of the Fifth Amendment to the Constitution. [1281]

2. The District Court has erred in approving a plan of reorganization which provides for a maximum capitalization that is so low as to be confiscatory, and therefore diverts assets of the Debtor from junior creditors to senior creditors.

3. The District Court has erred in approving a plan of reorganization which treats the new common stock, to be issued upon reorganization, for most purposes as having a value of \$57.00 and \$62.00 per share, but for the purposes of computing capitalization it is to be taken at \$100.00 per share.

4. The District Court has erred in approving a Plan which, though providing for a low capitalization and leaving substantial assets uncapitalized, requires the establishment and maintenance of a capital fund, thus diverting income from some creditors, especially the collaterally secured creditors whose status the Plan proposes to change by shifting them in part from a creditor to an equity position.

5. The Plan further depreciates the standing accorded by it to existing collaterally secured creditors

(a) by diverting income to sinking funds for both the new fixed and income mortgages;

(b) by providing for the conversion of income bonds into common stock at the rate of 20 shares per \$1,000, principal amount of such bonds;

(c) by providing that new preferred stock shall share ratably with common stock in divi-

dends declared in excess of 3% upon such common stock, and by other provisions (such as sale price of new stock) of a like effect. The effect of such a course upon future financing is obvious. [1282]

6. The District Court has erred in approving a plan of reorganization which treats the claim of the Reconstruction Finance Corporation upon a different basis with respect to the collateral securing that claim than similar claims of The Railroad Credit Corporation and the A. C. James Company to the extent that they are secured by the same or similar collateral.

7. The limitation on capitalization fixed in the Plan approved by the District Court does not constitute a valuation or appraisal of the Debtor's property, including the actual investment therein, such as is required by Section 77 of the Bankruptcy Act, as Amended, and the law of the land.

8. The District Court has erred in approving a plan of reorganization which concludes that "The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value."

9. The District Court has erred in approving a plan of reorganization which is unfair and inequitable, fails to afford due recognition to the rights of the Railroad Credit Corporation as a secured creditor in relation to the value of the collateral which it holds; discriminates unfairly

against The Railroad Credit Corporation in relation to other secured creditors; does not conform to the requirements of the law of the land regarding the participation of The Railroad Credit Corporation as a secured creditor, and is confiscatory of private property right of The Railroad Credit Corporation, in violation of the Fifth Amendment of the Constitution.

Dated October 8, 1940.

E. G. BUCKLAND,

WM. J. KANE,

Attorneys for The Railroad
Credit Corporation.

[Endorsed]: Filed Oct. 10, 1940. [1283]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT, THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR HEREIN, WILL RELY ON ITS APPEAL FROM THE ORDER OF THE ABOVE COURT MADE AUGUST 15, 1940, APPROVING THE PLAN OF REORGANIZATION OF THE DEBTOR CERTIFIED TO THE COURT BY THE INTERSTATE COMMERCE COMMISSION.

The Western Pacific Railroad Company, a corporation organized under the laws of the State of California, which has heretofore appealed to the

United States Circuit Court of Appeals for the Ninth Circuit from the order of the above-mentioned Court made August 15, 1940, approving a Plan of Reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon said appeal: [1284]

I.

The District Court erred in its conception of the functioning of the Court under Section 77 of the Bankruptcy Act and the law of the land and did not exercise the independent judicial judgment that the Court was required to exercise by said Section 77 and by the law of the land.

II.

The District Court proceeded upon the erroneous assumption and theory that it was entitled to exercise or was permitted to exercise only such jurisdiction or authority as might be exercised by a Court in a proceeding to set aside an order of the Interstate Commerce Commission under the Act of Congress commonly known as the "Urgent Deficiencies Act", approved October 22, 1913, and the Acts of Congress amendatory thereof.

III.

The District Court erred in approving a Plan of Reorganization for the Debtor, certified to it by the Interstate Commerce Commission, which is unfair and inequitable and fails to give due recognition to the Debtor's unsecured creditors and

stockholders and discriminates unfairly in favor of the holders of the Debtor's First Mortgage Bonds and does not comply with the law of the land requiring the participation of the Debtor's unsecured creditors and the holders of the Debtor's Preferred Stock and Common Stock in the following particulars, among others:

(1) Said Plan of Reorganization is applied to the Debtor's capital structure as it existed on January 1, 1939, instead of the Debtor's capital structure as it existed on August 2, 1935, in violation of Subsection (1) of Section 77 of the Bankruptcy Act and Section 103 of the United States Code Annotated, being the former Section 63 of the Bankruptcy Act.

(2) Said Plan of Reorganization gives recognition [1285] to large amounts of interest accrued but unearned subsequent to August 2, 1935, in violation of Subsection (1) of Section 77 of the Bankruptcy Act and Section 103 of the United States Code Annotated, being the former Section 63 of the Bankruptcy Act.

(3) Said Plan of Reorganization attempts to exclude the Debtor's unsecured creditors and the holders of its Preferred Stock and Common Stock from participation therein, although the undisputed evidence shows a substantial value for the equity represented by the Debtor's unsecured indebtedness and Preferred Stock and Common Stock.

(4) Said Plan of Reorganization attempts to take the Debtor's properties belonging in equity to its unsecured creditors and holders of Preferred Stock and Common Stock and transfer it to the holders of the Debtor's First Mortgage Bonds, without any appraisal, without any valuation and without due process of law.

(5) Said Plan of Reorganization attempts arbitrarily and without any express or implied authority under Section 77 of the Bankruptcy Act to so limit the capitalization of the Reorganized Company as to exclude the Debtor's unsecured creditors and the holders of its Preferred Stock and Common Stock from participating therein.

(6) Said Plan of Reorganization attempts arbitrarily and without any express or implied authority under Section 77 of the Bankruptcy Act to assign to new Common Stock of the Reorganized Company having no par value a value of \$100, for the purpose of estimating the total capitalization and a lower value or values in settlement of the claims of creditors so as to [1286] limit the total number of shares to an amount that will leave none available for the owners of the equity represented by the Debtor's unsecured debt and its Preferred Stock and Common Stock.

(7) Said Plan of Reorganization attempts to give undue preference to Reconstruction Finance Corporation.

IV.

The District Court erred in approving a Plan of Reorganization for the Debtor which provides for the appropriation of accommodation collateral pledged by the Debtor but not owned by it and at the same time provides that collateral belonging to the Debtor shall be surrendered to the Reorganized Company, all contrary to the principles of equity and good conscience.

V.

The District Court erred in approving a Plan of Reorganization for the Debtor which is based upon an erroneous determination by the Interstate Commerce Commission (which determination the Court expressly declined to review) that the Debtor's First Mortgage covered important items of property as a first and paramount lien thereon, whereas such items of property are covered by the Debtor's General and Refunding Mortgage as a first and paramount lien thereon, the value of such properties being not less than \$10,000,000.

VI.

The District Court erred in approving a Plan of Reorganization for the Debtor providing for a capitalization more than \$10,000,000 greater than the Debtor's secured indebtedness without at the same time making provision for the Debtor's unsecured indebtedness and Preferred Stock and Common Stock.

VII.

The District Court erred in approving a Plan of Reorganization for the Debtor providing for annual capital expenditures [1287] out of estimated future income of \$606,095, without giving credit for such earnings to the Debtor's unsecured creditors and Preferred and Common stockholders.

VIII.

The District Court erred in approving a Plan of Reorganization for the Debtor wherein the capitalization of estimated future earnings is substituted for the elements of value required to be considered by the law of the land.

IX.

The District Court erred in approving a Plan of Reorganization for the Debtor designed to take large amounts of capital invested in the Debtor's property under the protection of the Fifth Amendment and to dedicate such property to the public use without just compensation or without any compensation.

X.

The District Court erred in approving a Plan of Reorganization for the Debtor which fails to meet the requirements of Subsections (b), (c) and (e), of Section 77 of the Bankruptcy Act and in refusing to disapprove such Plan of Reorganization and refer the proceeding back to the Inter-

state Commerce Commission in accordance with the provisions of said Subsection (e).

Dated, October 9th, 1940.

PIERCE & GREER,

C. W. DOOLING,

Attorneys for Appellant,

The Western Pacific

Railroad Company.

[Endorsed]: Filed Oct. 10, 1940. [1288]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT, IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, WILL RELY ON ITS APPEAL FROM THE ORDER OF THE DISTRICT COURT MADE AUGUST 15, 1940, APPROVING PLAN OF REORGANIZATION OF DEBTOR. [1289]

Irving Trust Company, as Substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company (hereinafter termed the "General and Refunding Mortgage" and dated as of January 1, 1932, and executed on February 29, 1932), which has heretofore appealed to the United States Circuit Court of Appeals for

the Ninth Circuit from the order of this Court made August 15, 1940, approving a plan of reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal.

1. The District Court has erred in approving a plan of reorganization which is unfair and inequitable to the holders of the General and Refunding Mortgage bonds and is contrary to the requirements of the law of the land regarding participation of said General and Refunding Mortgage bondholders and the provisions of Section 77 of the Bankruptcy Act.

2. The District Court has erred in approving a plan of reorganization which does not afford due recognition to the rights of the holders of bonds secured under the General and Refunding Mortgage bonds and discriminates unfairly in favor of the holders of bonds secured by the First Mortgage of the Western Pacific Railroad Company, dated June 26, 1916.

3. The District Court has erred in approving a plan of reorganization which fails to recognize that the Debtor's equity (amounting, as of the inception of the reorganization proceeding, to about \$6,100,000) in rolling-stock subject to conditional sale or equipment trust agreements is free from the lien of the aforesaid First Mortgage and subject only to the lien of the General and Refunding Mortgage.

4. The District Court has erred in approving a plan of reorganization which fails to recognize that the [1290] aforesaid First Mortgage is a first lien upon the Northern California Extension only to the extent of the First Mortgage Bonds used in the acquisition thereof, and that otherwise the said Northern California Extension is subject to the *pari-passu* lien of the General and Refunding Mortgage.

5. The District Court has erred in approving a plan of reorganization which fails to recognize that substantial items of non-carrier real estate, as well as cash, and receivables are free from the lien of either the First Mortgage or the General and Refunding Mortgage and that, therefore, the holders of General and Refunding Mortgage Bonds are entitled to share in the value thereof and to receive securities of the same type as issued to holders of First Mortgage Bonds on account of their share therein.

6. The District Court has erred in approving a plan of reorganization which fails to attribute adequate value to the cash deposited under the General and Refunding Mortgage and to the vote and stock of Tidewater Southern Railway Company pledged under said Mortgage.

7. The District Court has erred in approving a plan of reorganization which fails to recognize that the Central California Traction Company bonds and stock and the Alameda Belt Line Stock, all pledged under the General and Refunding Mortgage, are of material value and such value

should be considered in determining the allocation of securities.

Dated: October 9, 1940.

FELIX T. SMITH,

Standard Oil Building,
San Francisco, California,
Attorney for Irving Trust
Company, as Trustee afore-
said, Appellant.

PILLSBURY, MADISON & SUTRO,

Standard Oil Building,
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**DAVIES, AUERBACH, CORNELL & HARDY,
ORRIN G. JUDD,**

One Wall Street,
New York, New York,
of Counsel.

[Endorsed]: Filed Oct. 10, 1940. [1291]

Before the Interstate Commerce Commission

Finance Docket No. 10913

The Western Pacific Railroad Company Reorgani-
zation.

**REPLY OF RECONSTRUCTION FINANCE
CORPORATION TO EXCEPTION BRIEFS
FILED BY OPPOSING PARTIES TO
PROPOSED REPORT OF THE BUREAU
OF FINANCE.**

Three plans were filed with the Commission in
this proceeding; and the Bureau has recommended

that the Commission adopt a plan which differs from any of the three filed. Each of the intervening parties has filed exceptions, with accompanying briefs, to the plan proposed by the Bureau,

At page 51 of the brief filed by the Bondholders' Committee the following suggestion is made:

"The Bureau Plan seems lacking in specification on ~~an~~ important substantive points. To obviate any justifiable basis for such a criticism of the ultimate Plan, the Bondholders' Committee urges that before the Commission publicly announces the Plan which it will approve, it give to all the interested parties an opportunity to confer with its representatives and work out the provisions of the ultimate Plan in sufficient detail to make to the security holders an adequate disclosure of what they are voting upon."

Reconstruction Finance Corporation (hereinafter called "Reconstruction") regards this as a constructive suggestion, inasmuch as such a conference should afford the Commission an opportunity of [1510] exploring the practical chances of a composition being worked out in this proceeding. The brief filed by the Debtor is frankly based upon the following assumption (page 30):

"Section 77, like the Frazier-Lemke Act, the Home Owners' Loan Act, the various state enactments providing for the suspension of foreclosure remedies, and a great mass of legislation, Federal and state, which came in the wake of

the depression, was all for the protection and relief of the Debtor, and not for the aid of the creditors, and we submit with all deference, to the Bureau of Finance that the Commission should recognize this as the true spirit of Section 77."

"The position of the Debtor is shown by the emphasis given to the above statement by placing it in the concluding paragraph of its brief (page 30).

"The very nature of a composition is that a plan will be evolved which will receive the approval of the required percentage of *each class* of creditors and stockholders. This is admitted in the brief filed in behalf of the Debtor in the Chicago and Eastern Illinois Railway Company Reorganization Proceedings, Finance Docket No. 9952, from which we shall take the liberty of quoting (pp. 22-23):

"At the outset of our analysis of the statutory provisions we wish to direct attention to the fact that the principles of bankruptcy compositions go only to the point of binding dissenting minorities to compromises agreed to by a majority. If a majority will not agree the due-process clause of the Constitution prevents imposition of a composition upon them. See *Louisville Bank v. Radford*, 295, U. S. 555, particularly at pages 585-586; *Ogilvie v. Dexter Horton Estate*, 86 F. (2d) 282, at p. 283. [1511] It necessarily follows that statutory provisions prescribing for dissenting *classes* better treat-

ment than composition principles would produce in no way negative the conclusion that the statute adopts composition principles with respect to the treatment of dissenting minorities in classes which accept the plan. Similarly, statutory provisions and decisions determining how much must be given to a class in order to eliminate the necessity of its consent are not in point. Typical of such decisions are *Tennessee Publishing Co. v. American National Bank*, 81 F. (2d) 463; *In re Murel Holding Corporation*, 75 F. (2d) 941; *San Francisco Bldg. Corporation, Limited v. Battson*, 83 F. (2d) 93. The holding in *Louisville Bank v. Radford*, 295 U. S. 555, was on such a point.

"We are here concerned only with the treatment which the statute prescribes for dissenting minorities in classes which accept the plan; not with the treatment which must be accorded non-assenting classes. *Composition principles cannot be applied to the latter situation.*" (Italics ours.)*

* To prevent misunderstanding, it must not be taken for granted that Reconstruction agrees with the viewpoint of the Debtor in the Chicago and Eastern Illinois proceeding, that, even in a case where it would seem likely that the requisite assents can be obtained from each class, the so-called doctrine of *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 432, is not applicable. On that point, it is not necessary to take a position in this proceeding at the present time, since on the basis of the record herein, it remains to be shown that a composition can be proposed which will be acceptable to all the various classes. [1512]

If from such a conference it would appear to the Commission that there is no reasonable expectation of the Commission being able to approve a plan in the instant reorganization proceeding, which will command the assent of each class of creditors, then it is respectfully submitted that the Commission has no other alternative herein (if it is to approve any plan at all in this proceeding) than to approve a plan which recognizes the well-established decisions of the Supreme Court and the lower Federal courts with respect to railroad reorganizations, giving effect to the elementary principles so effectively stated by District Judge Hincks in the New York, New Haven and Hartford Railroad Company reorganization proceeding now pending in his court and before this Commission, viz:

“* * * since only an equitable plan may be approved, the plan must provide that every creditor in the order of his priority shall receive under the plan rights which in equity are the fair equivalent of such of his rights as have been subjected to equitable modification, at least in so far as the assets of the debtor's estate permit. *Any creditor found to be only partially secured is entitled to the equitable equivalent of such security as he has, with a right to share in equality with common creditors for the excess of his claim as allowed above the value of his security as ascertained by equitable considerations.* And the plan must recognize the prior right of common

creditors with respect to such assets and remain after equitable treatment has been accorded to secured creditors. *Kansas City Ry. v. Central Union Trust Co.*, 271 U. S. 445. Such is the intent of the Act: * * * (Italics ours.) In re New York, New Haven and Hartford Railroad Company; 16 F. Supp. 504, 509 (D. C., D. of Conn., Sept. 16, 1936).

The position taken by Reconstruction and the position taken by The Railroad Credit Corporation in their exceptions, are in accordance with the foregoing equitable principles. So, likewise, would seem to be the position taken by the Bondholders' Committee except that it is based on the assumption that the General and Refunding Mortgage is in all respects junior to the First Mortgage, a view which [1513] is clearly erroneous, as shown by exceptions, and accompanying brief, filed by the Irving Trust Company, trustee of the General and Refunding Mortgage. Likewise, the Bondholders' Committee neglects entirely that there is pledged both with Reconstruction and The Railroad Credit Corporation other collateral besides General and Refunding Bonds. As a matter of fact, both these parties, as appears from their respective exceptions, hold substantial additional collateral. (See exceptions of Reconstruction, pp. 5-8, and exceptions of The Railroad Credit Corporation, pp. 2, 8-9.) The Committee likewise does not mention the Bureau's discrimination against Reconstruction in failing to

recognize some \$2,150,000 of accrued unpaid interest on the General and Refunding Mortgage Bonds pledged with Reconstruction, though recognizing the interest accrued and unpaid on the First Mortgage Bonds. Clearly, this interest is as much a part of the indebtedness represented by these Bonds, as is the principal thereof (see exceptions of Reconstruction, pp. 2-5).

The position of the A. C. James Co. requires special mention. It is not unlike the position taken by Reconstruction and The Railroad Credit Corporation, with one very important point of difference. The A. C. James Co. assumes that the claims of itself, Reconstruction, and The Railroad Credit Corporation are all fully secured and that there can be no deficiency on any of these claims. Without this assumption there can be no justification for the A. C. James Co. dismissing as [1514] inapplicable herein (page 19 of its brief) the rule in equity laid down in *First National Bank of Ottawa v. Kay Bee Co., et al.*, 366 Ill. 202, 7 N.E.(2d) 860 (1937), with respect to deficiency claims.

Unless, and until the Commission determines the value of the collateral pledged as security for the respective claims of Reconstruction, The Railroad Credit Corporation and the A. C. James Co., it is respectfully submitted that the Commission should recommend to the court that all three creditors be permitted to reduce their collateral to possession, in order that the deficiencies on their claims, if any, may be established in court in accordance with customary practice in past reorganizations.

By this reply Reconstruction is not to be deemed to have modified or waived in any way its rights as contended for in its exceptions and in the several briefs which it has filed herein. Neither is the failure to discuss in this reply any of the proposals or principles, or statements or conclusions of fact, set forth in any of the opposing exceptions and briefs, which are in disagreement with the position taken by Reconstruction in its exceptions and briefs, to be taken as either an acceptance or an admission of the soundness or accuracy of any thereof.

In filing this answer, Reconstruction desires to assist the Commission in the development of a plan that will be able to withstand [1515] attack by dissentient classes, and will lead to a successful reorganization of the Debtor in the present proceeding.

Respectfully submitted:

C. M. CLAY.

Assistant General Counsel.

Of Counsel:

CLAUDE E. HAMILTON, JR.

General Counsel.

[Endorsed]: Filed Oct. 5, 1939. [1516]

1662

A. C. James Co, et al. vs.

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter
of

**THE WESTERN PACIFIC RAILROAD
COMPANY REORGANIZATION.
REPLY BRIEF ON BEHALF OF**

Frederick H. Ecker, John W. Stedman and Reeve
Schlev, as a Committee representing a Group of
Not Exceeding Twenty-five Bona Fide Holders
of the First Mortgage Bonds of The Western
Pacific Railroad Company (Hereinafter Called
the Bondholders' Committee). [1517]

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The main briefs heretofore filed herein demonstrate that the Debtor and all its creditors are in agreement not only that the Bureau Plan is invalid but also that it is impracticable and unavailable as a basis of discussion for bringing together the various interests concerned in this reorganization.

While, on superficial examination, the paths of reasoning by which the several interested parties have reached this common conclusion would appear to be divergent, careful analysis of the arguments contained in the various briefs (including those filed before the Bureau in January) will indicate that in respect of certain problems, the various interests are thinking along somewhat similar lines. Such analysis will also furnish [1519] to the Commission the basis for recommending a plan which has (1) a reasonable chance of securing the assent of all classes of creditors or (2) in the alternative, a reasonable certainty of being carried through after a minimum of litigation and without being wrecked on constitutional grounds.

It will be the purpose of this Reply Brief to attempt such an analysis.

I

Total Capitalization

The Debtor and everyone of its creditors has opposed the drastically low capitalization imposed by the Bureau Plan, either directly or by urging a larger amount of securities for its own claim.

The Bureau Plan recommends a total capitalization of \$91,406,510, all in securities of par value.

As against this:

The Debtor¹ now asks \$88,518,269 with 300,000 no par value Common shares which, if valued at \$100 per share, gives a total of \$118,518,269 (brief, p. 29).

ACJ¹ now asks \$111,474,730, all in securities of par value (brief, p. 44).

The Bondholders' Committee asks \$69,553,056 plus 339,995 no par value Common shares which, if valued at \$100 per share, gives a total of \$103,552,556. The Bondholders' Plan contemplates the possibility (though not the probability) of a maximum of 150,000 additional shares of no par value Common Stock in connection with underwriting the raising of the new money.

While neither RFC nor RCC suggests a figure as to the total, both insist that the amount of securities allotted them in the Bureau Plan is inadequate, arguing not only for more securities for the principal of their collateral General and Refunding Bonds but also for more securities in recognition both of interest on these bonds and of other collateral (RFC brief, pp. 2-10; RCC brief, pp. 8-9). Accordingly, it is clear that the criticism of the Bureau Plan by RFC and RCC includes criti-

¹References are to the Debtor's Plan and the James Plan as modified by suggestions contained in the present main briefs of the Debtor and ACJ respectively. [1520]

cism of the low capitalization permitted by the Bureau Plan.

As has already been indicated by the two briefs heretofore filed by the Bondholders' Committee and for additional reasons hereinafter pointed out, the Bondholders' Committee believes that the total capitalization suggested by the Bondholders' Plan (1) provides an adequate amount of securities to permit "due recognition" of the rights of all parties; (2) is conservative in the light of all the "relevant facts", and (3) furnishes a reasonable compromise between the views of the junior creditors, based on their private interests, and the apparent views of the Bureau based on its conception of the public interest.

II

Total Debt.

The Bureau Plan limits the total debt to \$31,764,230.

As against this:

The Debtor now asks \$71,825,997 of debt (brief, p. 29).

ACJ now asks \$71,783,308 of debt (brief, p. 44).

The Bondholders' Plan contemplates \$41,622,250 of debt.

Again neither RFC nor RCC suggests any specific figure with respect to total permissible debt, but RFC mentions, with apparent acceptance of the principle involved, [1522] its original conditional offer under the Debtor's original Plan to pur-

chase \$10,000,000 of First Mortgage Bonds out of a total debt of \$77,591,595, of which \$25,675,000 were to be First Mortgage Bonds (RFC brief, p. 13).

The Debtor and ACJ request these large amounts of debt in order, as contemplated by their Plans, to permit all present debt to continue *as debt* (Debtor's brief, pp. 9-11, 27; ACJ brief, pp. 42-44).

Of course, the Bondholders' Committee would much prefer to have the bondholders interest in the property continue as debt, rather than be commuted into stock of any class, *if it believed the circumstances permitted*.

It was solely because the Bondholders' Committee endeavored fairly to appraise the public interest in a sound capital structure, as well as to recognize that the bondholders' own private interests would better be served by the attainment of a sound capital structure than by undue piling up of debt, that the Bondholders' Plan conceded the conversion into preferred stock of a part of the position of the present First Mortgage Bonds. As pointed out in its main brief, the Bondholders' Committee believes that its concession in this regard may have been greater than the circumstances really require, and may, as the Debtor's brief also suggests (p. 26), have resulted from the Committee's taking an unduly conservative view of the future prospects of the property.

If, however, while making this concession in "the public interest," the Bondholders' Plan neverthe-

less provides "due recognition" for the interests of the other creditors, does not the relative division of the capital structure into debt and stock proposed by the Bondholders' Plan furnish [1522] the most satisfactory and feasible basis for dealing with this particular problem?

III.

Total Fixed Charges.

While, on this point, the ACJ brief superficially indicates agreement with the Bureau Plan, and the RCC brief is silent, the arguments advanced in both those briefs with reference to the proposal of the Bureau Plan for raising the new money necessarily condemn the principle upon which the Bureau Plan based its limitation of obligations bearing a fixed charge (ACJ brief, p. 38; RCC brief, pp. 4-8).

Out of the permissible debt, the Bureau Plan and the James Plan permit only \$10,000,000 to be represented by First Mortgage fixed charge obligations.

The Debtor's original Plan urged \$25,675,900, and although its present brief accepts the bondholders' lower concession, the Debtor still declares its original suggestion of that amount to be sound (brief, pp. 8-9, 25-26).

The Bondholders' Plan proposes \$19,858,020.

The RFC, through its reference to its conditional offer to purchase at par \$10,000,000 of First Mortgage Bonds out of the total of \$25,675,900 pro-

posed by the original Debtor's Plan, indicates its approval of that amount of First Mortgage Bonds (brief, p. 13).

All the briefs, in their indication that the \$10,000,000 of First Mortgage 4% Bonds proposed by the Bureau Plan are worth a premium above par, with no bonus of Common Stock, indicate, as expressed by the RCC brief (p. 6) (and in substantially similar language by the RFC brief, p. 13), the belief of all parties that the Bureau Plan "tends [1523] not only to discredit the securities of the New Company but to discredit even the new First Mortgage Bonds themselves."

Here again the "ultra conservative" suggestion of the Bondholders' Committee, contrary to what might seem to be their own selfish interests, that the First Mortgage Bondholders receive only 20% of their principal in First Mortgage 4% Bonds, would seem to be both a generous recognition of the paramount public interest, and also a fair compromise in the light of the bondholders' further concession that 40% of their principal and all their interest may be converted into stock.

IV.

Future Financing

The RFC brief criticizes (p. 12) the provision of the Bureau Plan (equally pertinent to the Bondholders' Plan) permitting a total authorized issue of \$50,000,000 principal amount of bonds under the First Mortgage, with provision for future is-

sues for 75% of capital expenditures. It urges that this will encourage the piling up of debt and that "the new Mortgage should provide restrictions * * * against the issuance of additional bonds when there is insufficient earnings coverage." With the principle behind this suggestion of the RFC the Bondholders' Committee is in entire accord. It believes that the First Mortgage restrictions upon the issue of further bonds should be such as not to encourage the use of First Mortgage Bonds for future financing.

However, the detail of the RFC suggestion, it is submitted, is erroneous in two respects.

In the first place: The important thing is not the total authorized amount of First Mortgage Bonds, but the [1524] circumstances under which bonds may from time to time be issued. Indeed, if the restrictions upon future issues are such as to encourage the maintenance of a sound capital structure, it may well be wise to omit any dollar amount as the authorized maximum substituting a fixed maximum ratio to capital stock.

In the second place: It is in times when earnings coverage is reduced that a carrier will be forced to use its best bonds in order to keep down the cost of new money. It is in prosperous years when earnings coverage on senior bonds is excessively high, but earnings coverage on junior bonds or equity securities is adequate to permit their sale on reasonable terms, that the use of First Mortgage Bonds should be denied and the use of junior securities compelled. It was for that rea-

son that the Bondholders' Committee in its main brief adopted the suggestion contained in the Bureau's Proposed Report (but not in the Bureau Plan) that the Income Mortgage should be opened to provide for the new financing.

If Income Mortgage Bonds are to be saleable at any reasonable price to provide future financing, their interest cannot be wholly non-cumulative, but must be made cumulative for some reasonably limited period, such as the three years suggested by the Bondholders' Plan. Therefore, adequate provision for the future, as well as due recognition of the bondholders' present rights in the Debtor's property, requires that this limited cumulative feature pertain to the Income Mortgage Bonds.

The Bondholders' Committee also believes that under the capital structure which it proposes not only the Income Bonds, but also the Participating Preferred Stock, might be made available for future financing. [1525]

The details of these suggestions are too complicated to be set forth in this brief, and it is submitted, should not be worked out by the Commission itself without the benefit of conferences among all the interested parties. Accordingly, this is one of the points in respect of which the Bondholders' Committee urges that the Commission, when it has settled general principles involved, should confer with all the parties in interest to work out the detailed provisions of the ultimate Plan.

V.

No Par Value Common Stock.

With the arguments advanced in the Debtor's brief (pp. 14-19) in support of its contention that the Common Stock of the reorganized Debtor should be without par value, the Bondholders' Committee is in entire accord.

With the arguments advanced in the briefs of RFC (pp. 15-17) and RCC (pp. 4-7) that the use of par value stock creates a risk upon its recipients as to its full paid character and that this risk is accentuated by the provisions of the Bureau Plan with respect to the provision of new money, the Bondholders' Committee is also in accord. These arguments furnish an additional persuasive reason why the Commission should permit the Common Stock of the reorganized Debtor to be without par value.

VI.

Provision for New Money

Every creditor, even including ACJ, the dominating interest in the Western Pacific Corporation, joins in the condemnation of the Bureau's proposal for raising new money. All agree that that proposal constitutes such an [1526] unnecessary discrimination in favor of Western Pacific Corporation as completely to invalidate the Bureau Plan (Bondholders' brief, pp. 24-27; 41-47; RFC brief, pp. 11-18; RCC brief, pp. 4-8; ACJ brief, p. 38; Refunding Mortgage Trustee's brief, pp. 19-21). Even the

Debtor, the wholly owned subsidiary of the Western Pacific Corporation, impliedly disapproves the proposal (Debtor's brief, pp. 6, 28-29).

RFC and RCC join the Bondholders' Committee in pointing out the "unrealistic", "futile" and "illusory" character of the proposal of the Bureau Plan for successive offering of the new money "package" to the junior creditors and then to the First Mortgage Bondholders upon exactly the same terms as the original offering to the Western Pacific Corporation (RFC brief, p. 18; RCC brief, p. 7; Bondholders' brief, pp. 44-45).

The Debtor, ACJ, and RFC indicate a belief, and RCC a hope, that \$10,000,000 of First Mortgage 4% Bonds can be sold at par without a bonus of Common Stock.

The Debtor's original proposal (which as already pointed out the Debtor still defends, although accepting the bondholders' concession in asking but 20% instead of 30% in First Mortgage Bonds) and also the RFC brief (p. 13), indicate the belief that \$10,000,000 First Mortgage 4% Bonds can be sold at par, without a stock bonus, even though the total issue of such bonds aggregates \$25,675,900.¹

It must, therefore, be clear that the reasonable probability is that a "package" composed of \$10,-

¹The ACJ brief on this point is somewhat ambiguous since it is discussing \$10,000,000 of First Mortgage Bonds constituting the sole outstanding first lien, but on the other hand, part of a capital structure in which there is \$61,783,308 of additional debt.

000,000 of [1527] First Mortgage Bonds out of a total issue of but \$19,858,020, together with 30% of the Common Stock, subject to prior charges of only \$3,542,443 (only \$3,263,135 if the Preferred dividend is reduced to 5%) as proposed by the Bondholders' Plan, should be saleable at the par value of the bonds and provide the necessary new money.

The Bondholders' Plan also contains the provisions, suggested by the briefs of both RFC (p. 13) and RCC (p. 6), that if a 4% coupon will not bring substantially par for the bonds, the coupon rate may be adjusted upward.

The Bondholders' Plan also meets the criticism of RFC and RCC as to the illusory and futile character of the Bureau Plan's offerings of the new money "package", first to junior creditors, and then to the First Mortgage bondholders, after an offering on the same terms has been rejected by the Western Pacific Corporation. The Bondholders' Plan steps up, on the successive offerings, the amount of bonus stock to be contained in the "package" with the bonds; This tends to insure the raising of the new money even without raising the interest rate, should (as is not expected to be the case) the original offering to the Western Pacific Corporation not be availed of.

The Bondholders' Plan contains the further insurance feature of permitting underwriting. Although it is believed this will not be necessary, it would seem to be wise foresight to contemplate the possibility that it may be necessary by including in

the Plan such a permissive provision. The recent collapse of the securities market while several offerings to stockholders were outstanding, furnished striking examples of the value of underwriting.

The criticisms of RFC (p. 11) and RCC (p. 8) that the record shows no necessity for \$10,000,000 of new money [1528] overlooks the facts that already \$6,400,000 of Trustees' Certificates are outstanding which must be retired, and that an additional \$3,300,000 is required to complete the rehabilitation program (Ex. 38). There can be no question as to the necessity for the \$10,000,000 of new money.

The Bondholders' Committee therefore urges that the provisions of the Bondholders' Plan with respect to providing the new money should be approved by the Commission as written in the Bondholders' Plan and without the modification which the Bondholders' Committee indicated in its main brief it would be willing to accept (p. 58, modification 9).

VII.

Treatment of Present First Mortgage Bonds.

The Bondholders' Plan is predicated upon the fact that the First Mortgage is a lien prior to the General and Refunding Mortgage upon all assets of the Debtor of any substantial value.

That fact is recognized to the full in the Debtor's original Plan and the Debtor's new proposal (pp. 27-29) modifies it only to the extent of subordinating Preferred Stock allotted to present First

Mortgage Bond interests, in favor of notes allotted to RFC, RCC and ACJ.

Since the original James Plan denied participation to all claims for interest, it in principle recognized the full priority of the present First Mortgage Bonds, and its present modifications continue (pp. 42-44) to recognize that priority as to principal but, as in the case of the Debtor's modified Plan, subordinate Preferred Stock allotted to First Mortgage Bond interest to debentures proposed to be issued to junior creditors. [1529]

Upon the fact of the First Mortgage priority the Bondholders' Committee will stand. The contrary contention made in the brief of the Irving Trust Company, as Trustee under the General and Refunding Mortgage, is without sufficient merit to justify any concession by the bondholders by way of compromise with respect either to the principal of, or the interest upon, the present First Mortgage Bonds.

For the answer to this contrary contention the Bondholders' Committee refers both to its own and the First Mortgage Trustees' January, 1937, briefs before the Bureau of Finance and to the present reply brief of the Trustees under the First Mortgage.

Concurring with the assertion of the Bondholders' Committee as to the priority of the First Mort-

¹See pages 36-63. See particularly page 56 with reference to agreements made by RFC, RCC and ACJ with the bondholders upon their extension of the 1934 bond interest.

gage, the Bureau Plan nevertheless commuted the present First Mortgage Bonds into

Non-cumulative, 4% Income Mortgage Bonds for 40% of principal;

Non-cumulative, 5% Preferred Stock for 60% of principal;

Common Stock for accrued interest, but on a basis less favorable than that allotted junior creditors.

That there is no possible justification for such drastic treatment of the First Mortgage Bonds, nor any possible expectation that it would be accepted by the bondholders, [1530] seems clear even from the arguments advanced in the briefs of the Debtor and the other creditors.

The Debtor (pp. 25-29) now tenders the First Mortgage Bondholders

20% of principal in First Mortgage 4% Bonds.

80% of principal in non-cumulative, 4% Income Mortgage Bonds; and

Interest in Preferred Stock, but subordinate to the principal of notes issued to junior creditors.

The James Plan, as now modified (pp. 42-44), offers:

100% of principal in non-cumulative, 4% Income Mortgage Bonds; and

Interest in Preferred Stock, but subordinate to the principal of debentures issued to junior creditors.

The Bondholders' Committee, in an "ultra conservative" concession to the public interest in a sound capital structure, asks:

20% of principal in new First Mortgage
4% Bonds,

40% of principal in Income Mortgage 5%
Bonds, cumulative against three years' income;
and

40% of principal, and accrued interest, in
6% Preferred Stock non-cumulative to the extent that dividends for any year are not earned.

The arguments advanced in the briefs of the Debtor and all its securityholders establish that this allotment can be made within the limits of a sound, even conserva- [1531] tive, capital structure (Debtor's brief, pp. 5-9, 25-27; Bondholders' brief, pp. 8-35; ACJ brief, pp. 4-10, 42-44; RFC brief, pp. 11-18; RCC brief, pp. 4-8).

The principles enunciated even in the proposed Bureau Report sustain the bondholders' request.

The Commission should therefore approve it as made, including a maximum dividend rate of 6% on the Preferred Stock to compensate for the years in which the earnings will provide a dividend, if any, materially below the 5% return on the present First Mortgage Bonds. However, as stated in the main brief of the Bondholders' Committee (pp. 32-34), it is not believed that a reduction of the Preferred Stock dividend rate from 6% to 5% would defeat acceptance of the Plan by the bond-

holders in the interest of an expeditious reorganization if the Commission, sitting in a judicial capacity (as contrasted with "trading"), should determine that such a concession is required.

VIII.

Treatment of RFC, RCC and ACJ.

The briefs filed on behalf of these three creditors demonstrate not only the complicated character of their rights in the Debtor's property but also the hopeless conflict between them as to the proper method of appraising those rights in the reorganization.

The ACJ brief concedes (pp. 15-23) that the effect of the pledge of the General Mortgage Bonds to secure the RFC Note, RCC Note and ACJ Note, was not to create a new and additional *debt* (in the form of General and Refunding Bonds), but merely to give to the three Notes rights in the property proportionate to their collateral, [1532] and that upon the enforcement of their collateral they should share the proceeds in proportion to the principal amounts of their collateral, but up to the amount of the debts represented by the Notes, *if those proceeds so distributed leave a deficiency on any of the Notes*. But it asserts that they cannot properly be allotted new securities in proportion to the principal amount of their collateral, *because the Notes are all fully secured and there can be no deficiency on any of them*.

RFC (pp. 2-5) and RCC (p. 8), on the other hand, apparently assert that the Debtor's *debt* to

them is represented by the pledged General and Refunding Mortgage Bonds, and that they are entitled to interest on those bonds. This means that RFC contends that for a *loan* of \$2,963,000 the Debtor incurred a *debt* of \$10,750,000 which together with interest to January 1, 1938 amounts to \$12,900,000 (see RFC brief, pp. 4-5). If this proposition needs any more answer than its mere statement, the answer is to be found in the very cases cited by ACJ (pp. 17-18), the fellow creditor of RFC and RCC, as well as the cases cited in the January, 1937, brief (p. 66) of the Bondholders' Committee.

RFC (pp. 8-10) and RCC (pp. 4-8), in further conflict with the contentions of ACJ, deny that they are fully secured, and assert that they are entitled in the reorganization, not merely to securities for their debt itself, plus apparently also for their collateral itself, but also to additional securities in recognition of their "deficiency". This contention produces the somewhat anomalous result that the less a secured creditor is secured (i.e. the greater his deficiency), the greater will be his participation in the reorganization of his debtor. [1533]

All three of these junior creditors (RFC brief, pp. 5-8; RCC brief, pp. 8-10; ACJ brief, p. 24) also make much of the point of their interlocking and cross liens (e.g., the second lien of RFC upon certain RCC collateral and conversely the second lien of RCC upon certain RFC collateral) and seem to make the argument that the fact that there are

two liens upon the same collateral requires a double allotment of securities in the reorganization. This complication is also adverted to in the Debtor's brief (pp. 19-21, 27).

RFC (pp. 5-8) and RCC (pp. 8-10) also stress ~~their rights in collateral~~, not affecting the Debtor or its property (e.g., the D&RG stock), but pledged by third parties to secure the indebtedness of the Debtor. Their argument apparently is that because third parties have pledged independent property to secure the Debtor's obligations, the Commission and the Courts are without power under Section 77 to affect the Debtor's obligations in respect of which the third party pledge was made.

The Debtor joins the chorus of complications with the point that the Bureau Plan disregards its "equity of redemption" in the pledged General and Refunding Mortgage Bonds and asserts its right (p. 20) to

- (a) a reasonable nisi period within which the Debtor may pay, and
- (b) an opportunity to bid at a public sale, and
- (c) a reasonable period thereafter within which to redeem.

With all this controversy between the junior creditors themselves, and between them and the Debtor, the Bond- [1534] holders' Committee has no concern except to see that the ultimate Plan shall so deal with these three creditors that none of them

has a reasonable chance of invalidating the Plan upon any of the points in controversy.

Both the Debtor's Plan, as now modified (pp. 27-29), and the James Plan, as now modified (pp. 42-44), attempt to solve this problem by allotting to the three junior creditors notes or debentures for the principal amount of their claims with accrued interest to the effective date of the Plan. These notes or debentures constitute fixed debt, maturing, in the case of the Debtor's Plan in 15 years, and in the case of the James Plan in 60 years, and in both cases ranking in priority to the Preferred Stock allotted to the accrued interest on the present First Mortgage Bonds. The Debtor proposes that these notes should be secured by new Preferred Stock in the same principal amount as the pledged General and Refunding Mortgage Bonds. ACJ would make the debentures convertible into \$1,500 par value of Preferred Stock for each \$1,000 Note, thus ultimately allotting to these junior creditors new securities ranking *pari passu* with those which ACJ allots to present First Mortgage Bondholders' interest, but with a premium of 50% in excess of the rate at which that stock is allotted to the First Mortgage Bonds.

Obviously these suggestions are wholly impracticable, as well as indirectly discriminatory against the present First Mortgage Bonds.

If the present First Mortgage Bonds are to be commuted in part into stock, the junior debt cannot remain as debt, whatever the maturity of that debt may be.

Even if the present First Mortgage Bonds were to remain wholly (including accrued interest) as debt, it [1535] would not be proper to permit the debt issued for the junior RFC, RCC and ACJ claims to have a maturity earlier than that of the new obligations allotted to the First Mortgage Bonds and thus permit the payment of the junior creditors before payment of the senior bonds.

The situation does not permit the allocation to the RFC, RCC and ACJ General and Refunding Mortgage Bond collateral of anything higher than stock, and, the bondholders having made the concessions which the Bondholders' Plan tenders with respect to the bondholders' position, the Bondholders' Committee is in accord with the recommendation of the Bureau's proposed Report that the stock allotted in respect of the collateral General and Refunding Mortgage Bonds should be Common Stock.

But since the three creditors concerned cannot agree among themselves on a simple resolution of their complicated situation by the present distribution of that stock, the Commission must, if it is to have a Plan which will withstand attack, use a device which will recognize all the complicated legal rights which are properly asserted by these three claimants. That device is furnished in the Escrow Certificates provided by the Bondholders' Plan for these three claimants.

These Escrow Certificates constitute obligations of the reorganized Debtor to pay to the three several claimants the full amount of their respective

claims as of the effective date of the Plan, with interest at the rate of 4% per annum from that date to the maturity dates of the Certificates (RFC 5 years, RCC 6 years, and ACJ 7 years), or in the alternative, at the option of the reorganized Debtor, to deliver to the holders of the Escrow Certificates upon their maturity dates, the Common Stock issued in respect of the collateral General and Refunding Mortgage Bonds. [1536]

The successive rights of RCC in the RFC collateral, and of ACJ in the RFC and RCC collateral, are recognized by giving each successive claimant the right to redeem the collateral on which it has the subordinate lien by paying off the holder of the prior lien. Furthermore, this device recognizes the rights asserted by the Debtor as above quoted by giving to the Debtor a substantial "nisi period" within which to pay, and, in effect, a right of redemption.

The right of RFC, RCC and ACJ to interest on their claims to the effective date of the Plan is recognized by including in the principal amount of the Escrow Certificates the amount of that accrued interest. Their right to continuing interest on their claims thereafter is recognized by the provision that neither a junior creditor as to any of them, nor the Debtor itself, can redeem the Common Stock pledged under any Escrow Certificate, without paying interest upon the unpaid amount of the Escrow Certificate at the rate of 4% per annum from the effective date of the Plan.

The contention of RFC and RCC that they should have interest not only upon their primary debt but also upon their collateral bonds is, of course, wholly fallacious.

On the other hand, the contentions of RFC and RCC are sound that collateral pledged by third parties to secure their Notes, and not constituting a claim against the Debtor's property (e.g., the D&RG stock), should not be affected by the reorganization of the Debtor. Indeed, neither the Commission nor the Court can affect such outside collateral, for their jurisdiction, under Section 77, is limited to the *Debtor's property*. But on the other hand the fact of this independent collateral cannot add to the [1537] rights of RFC and RCC, *in the Debtor's property*; as against other creditors of the Debtor. Hence, the apparent arguments of RFC and RCC that (1) the existence of this outside third party collateral prevents the disturbance of their claims against the Debtor, or (2) that in the reorganization of the Debtor they must be allotted securities of the reorganized Debtor in recognition of this outside third party collateral are both entirely unsound.

The Bondholders' Committee did not intend, in the Bondholders' Plan, in any way to affect the outside third party collateral. To make the matter clear, and to protect RFC and RCC against any contrary claim by either ACJ or Western Pacific Corporation, the third party pledgors, an express declaration to the effect that the delivery of the

Escrow Certificates shall be without prejudice to any rights which RFC and RCC may have in outside third party collateral should be added to the Bondholders' Plan, and contained in the Escrow Certificates themselves.

RCC (p. 3) makes the further contention that it is entitled to preserve its rights under the Marshalling and Distributing Plan. The Bondholders' Plan expressly so provides with respect to the Escrow Certificate proposed to be delivered to RCC.

Accordingly, the Commission, to insure a Plan which cannot be upset by RFC, RCC or ACJ upon any argument founded upon the complications of their situation, should approve the adoption of the device of Escrow Certificates proposed by the Bondholders' Plan. Notwithstanding the willingness of the Bondholders' Committee, so far as the bondholders themselves are concerned, to eliminate those provisions, the Commission should not now eliminate them. [1538]

IX.

Protection of Dissenting Classes by Sale at Fair Up-Set Price.

The conflicting assertions of ACJ that the RFC, RCC and ACJ Notes are fully secured, and of RFC and RCC that they are entitled to recognition of a "deficiency," as well as the Debtor's own contention that its rights in the property represented by the General and Refunding Mortgage cannot be "expropriated" without "an opportunity to bid at

a public sale" confirm the wisdom, if indeed not the necessity, of including in the Plan the provision expressly permitted by sub-section (b) (5) of Section 77 for "the sale of all * * * the property of the Debtor * * * at not less than a fair up-set price" for the protection of any class which may dissent from the ultimate Plan.

The insertion of such a provision would also seem to be a wise precaution against an attack by the Debtor, or by the Western Pacific Corporation, upon the propriety of the finding, recommended by the Bureau, that the equity of the Preferred and Common stockholders of the Debtor has no value. While the Bondholders' Committee is not inclined to dispute the correctness of the Bureau's finding, it recognizes that the basing of the reorganization upon that finding (certainly on the present sketchy record) will subject the reorganization to the risk of long and complicated litigation which, to say the least, will not be frivolous. It is submitted that the public interest, as well as the private interest of the parties, that this particular reorganization shall be expedited, and the public interest that Section 77 shall be made workable, all require the elimination of this risk by the inclusion of the provision for a sale at a fair up-set price. The stockholders [1539] of the Debtor could then have no cause for complaint, even if the proposed Report were erroneous in its finding that their equity has no value.

Assuming the inclusion of such a provision, then if the Plan be confirmed but the First Mortgage

Bondholders dissent as a class, ACJ, believing the General and Refunding Bonds to be fully secured, can pay off the dissenting First Mortgage Bonds, or more probably, can bid in the property at that price, lower than the principal amount of those Bonds, at which the bondholders would be willing to give up their interest in the property.

Similarly, if either RFC, RCC or ACJ shall be a member of a dissenting class, they or any of them can bid in the property if they think it worth more than the bondholders are willing to pay to keep it for reorganization.

This expressly recognized "means for execution of the plan" would also serve to test out the rival claims of the First Mortgage Bondholders and the junior creditors as to the priority of the First Mortgage. The properties could be sold in parcels at a judicial sale and reorganized under the plan without waiting the delays which the ingenuity of counsel for the junior creditors can undoubtedly conceive in the litigation which will ultimately establish the priority of the First Mortgage. The proceeds of sale can be distributed later when the rights of the dissenting classes have been established. The judicial sale of properties similarly complicated by conflicting claims, and their reorganization, frequently occurred under the old equity procedure, the distribution of the proceeds of sale awaiting the determination of the litigation. [1540]

X.

Effective Date of the Plan.

RCC objects (p. 11) to January 1, 1937, as the effective date of the Plan on the ground that it is a date already passed. This objection seems to the Bondholders' Committee not to be without merit. The Commission should bear in mind that unless it promptly approves a Plan which has substantial hope of acceptance by enough securityholders to permit its consummation, even in the face of litigation, interest both upon the First Mortgage Bonds and upon the junior RFC, RCC and ACI Notes will accrue in such an aggregate amount as to disturb the relationships between the parties and make January 1, 1937, so unreasonable an effective date as itself to constitute a valid objection to the Plan.

XI.

Conclusion.

The Bondholders' Committee urges the Commission, upon its consideration of all the arguments which have been made during the long delay of these proceedings, first in the January briefs of the several parties, then in the main briefs filed upon submission of the Bureau's proposed Report and the Bureau Plan, and now in the reply briefs, to approve the Bondholders' Plan with *only* the following modifications:

1. Modify the provisions of the new First Mortgage with respect to the issue of future First Mortgage Bonds, and open the Income

Mortgage to provide for future financing through Income Bonds, all under provisions to be worked [1541] out in conference with the parties and designed to induce future financing through junior securities, whenever such financing is feasible upon reasonable terms.

2. Eliminate the Contingency Reserve Fund.

3. Make the Sinking Fund payable out of available net income before Preferred dividends, but, as provided in the Bureau Plan, reduce it to an annual $\frac{1}{2}$ of 1% Fund instead of a 1% Fund.

4. Clarify the provision respecting the offering of new securities to provide new money, by providing that it shall be made to the unsecured creditors, or their assignees (i.e.: the Western Pacific Corporation or RCC as its assignee, and Western Realty Company or Curtiss Southwestern Company as pledgee of its stock) proportionately to the amounts of their respective claims.

5. Include in the Escrow Certificates to be delivered to RFC and RCC for their Notes express provisions that they are delivered only in extinguishment, under Section 77, of the claims of RFC and RCC against the Debtor or its property; and that neither the delivery of said Escrow Certificates, nor their acceptance by RFC or RCC, shall prejudice the rights of RFC or RCC against collateral which has been

delivered by third persons to secure the obligations of the Debtor and which does not itself constitute a claim against the Debtor or the Debtor's property. [1542]

6. Provide that the Reorganization Committee shall be constituted of such number of members, not more than five, as the Commission may determine, but a majority of whom shall be elected by the bondholders in any manner which the Commission may prescribe.

7. Eliminate the provision requiring the consent of two-thirds of the bondholders to the confirmation of the Plan, but extend the provision for protecting a dissenting class through a judicial sale at a fair up-set price to include the bondholders as a class.

The Bondholders' Committee repeats its willingness to recommend acceptance by the bondholders of the further modifications mentioned on pages 58 and 59 of its main brief (including the reduction of the dividend rate on the Preferred Stock from 6% to 5%), if the Commission shall determine that any of those modifications should fairly be required. The Bondholders' Committee, however, now urges, in the light of the arguments revealed in the main briefs of several of the parties, that the modification of the Preferred Stock dividend rate is neither required nor fair, and that the suggested modifications of the procedure for raising the new money and for dealing with the claims of RFC, RCC and ACJ would be most unwise.

The Bondholders' Committee hopes that the Commission will recognize (what the Bureau seems to have failed to recognize) that the Bondholders' Committee has approached the problem of the Western Pacific Reorganiza- [1543] tion with a desire to give full recognition to the public interest, wherever it may conflict with the private rights of the bondholders, and also with the desire, as between their own private rights and those of other creditors, not to be unyielding or grasping of their 'pound of flesh', but to make extreme concessions to junior interests in the hope of avoiding a forfeiture of those junior interests and of permitting them ultimately to recoup their present investments through the future growth and prosperity of the reorganized property.

Respectfully submitted,

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[Endorsed]: Filed Oct. 5, 1936. [1544]

Before the
Interstate Commerce Commission
Finance Docket No. 10913.

The Western Pacific Railroad Company
Reorganization

REPLY BRIEF ON BEHALF OF CROCKER
FIRST NATIONAL BANK OF SAN FRAN-
CISCO AND SAMUEL ARMSTRONG, AS
TRUSTEES UNDER THE WESTERN PA-
CIFIC RAILROAD COMPANY FIRST
MORTGAGE DATED JUNE 26, 1916. [1545]

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		[1547]

Introductory Statement.

The Refunding Mortgage Trustee has filed exceptions to the conclusions in the Report with respect to the extent and priority of the lien of the First Mortgage. The First Mortgage Trustees believe that the conclusions in the Report in this respect are correct and should be approved by the Commission.

This Reply Brief will be confined to a discussion of certain points raised in these exceptions of the Refunding Mortgage Trustee. For a more comprehensive analysis of the questions involved, the First Mortgage Trustees beg leave to refer to their brief dated January 9, 1937, heretofore filed in this proceeding. [1548]

I.

The Conclusions in the Report are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to the Equity in Equipment Subject to Leases, Conditional Sale Agreements or Equipment Trust Agreements.

The exceptions of the Refunding Mortgage Trustee to the conclusions in the Report with respect to the priority of the First Mortgage over the Refunding Mortgage as a lien on the Debtor's equity in equipment covered by leases, conditional sale agreements or equipment trust agreements are based upon the following grounds specified at pages 3-4 of the brief of the Refunding Mortgage Trustee dated September 24, 1937:

1. That the First Mortgage expressly excepts such equipment unless acquired by the use of First Mortgage Bonds or cash; and that the record shows that no First Mortgage Bonds or cash were used in the acquisition of such equipment.

2. That the First Mortgage omits the provision contained in the Refunding Mortgage* to the effect that when and as the Debtor acquires an equity in such equipment the equity becomes subject to the Refunding Mortgage.

3. That the Listing Application of December 21, 1931 (Exhibit 112), specifically states that such equipment is not subject to the lien of the First Mortgage. [1549]

4. That the Report is directly contrary to the conclusions reached in the memorandum opinion of Circuit Judge Sanborn in *The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al.*, which is discussed at pages 52-54 of the brief of the Refunding Mortgage Trustee dated January 11, 1937.

These points will be discussed in order.

(a) The So-called "Exception Clause" in the First Mortgage.

*In the briefs of the Refunding Mortgage Trustee dated, respectively, January 11 and September 24, 1937, the Refunding Mortgage is referred to as the "General Mortgage".

The Refunding Mortgage Trustee contends that the equity in the equipment covered by the three equipment trusts and the Baldwin Lease is entirely free of the lien of the First Mortgage, by reason of the following language (the so-called "exception clause") appearing on page 22:

"and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

The brief of the First Mortgage Trustees dated January 9, 1937, sets forth the reasons why this contention is deemed unsound and states what the First Mortgage Trustees believe to be the correct interpretation (see pages 66-68). That brief points out that the "exception clause" should be construed both in the light [1550] of the language which precedes it in the same paragraph* and in the light of

*The language referred to is the language on page 21 of the First Mortgage which states in effect that the right of the Debtor to acquire property free from the lien of the First Mortgage shall not apply to "equipment * * * consisting of * * * property * * * used or acquired for use in or for the * * * operation of * * * any of the lines of railroad * * *

the paragraph which follows the habendum clause on page 22.** It further points out that the "equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby", mentioned in the paragraph following the habendum clause, are those referred to in the "exception clause" and that therefore the "exception clause" cannot have the effect of making all equipment acquired under equipment trusts entirely free of the lien of the First Mortgage.

The First Mortgage Trustees believe that the correct interpretation of the provisions in question is as follows: the Debtor may acquire equipment and create equipment trust liens which are superior to the lien of the First Mortgage; if the equipment

subject * * * to the lien of this indenture." The record shows that the equipment covered by the three equipment trusts and the Baldwin Lease was acquired for use, and was actually used, on the mortgaged lines.

**The full text of the paragraph following the habendum clause is as follows:

"Subject, however, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, and as to any property hereafter acquired by the Company or by any successor or purchasing corporation and becoming subject to the lien of this indenture, to any liens thereon existing at the time of such acquisition and not expressly prohibited by the terms of this indenture."

is of such character that it would, under the after-acquired property clauses, be free of the lien of the First Mortgage if otherwise acquired, it will be free of the lien when acquired under an equipment trust; but, if the equipment is of such character that it would, if otherwise acquired, be subject to the lien of the First Mortgage, that lien will attach, [1551] subject to the lien of the equipment trust, and will spread to the Debtor's equity in the equipment as payments are made on the equipment trust obligations.

The Refunding Mortgage Trustee, in its brief dated September 24, 1937 (see pages 4-8), attempts to meet that argument by suggesting that the phrase "equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby" refers only to the possibility that the equity in equipment, subject to equipment trust or conditional sale agreements, might be acquired by the use of First Mortgage Bonds or deposited cash, in which case such equity might come under the First Mortgage by virtue of the provisions relating to the use of First Mortgage Bonds or deposited cash.

Not only is there nothing in the language of the First Mortgage to indicate that the phrase quoted has so restricted a meaning; the suggested interpretation ignores the practical realities of equipment trust financing. For a railroad to purchase equipment under an equipment trust and to finance the acquisition of the equity with first mortgage bonds authenticated and delivered against the ac-

quisition of such equity would be so unusual as to be a practically unheard of situation. It is difficult to believe that the draftsman of the First Mortgage inserted the phrase above quoted merely to provide for such a situation. It is logical to suppose that he had in mind situations involving the ordinary methods of equipment trust financing.

The phrase "as to equipment hereafter acquired", to which the phrase above quoted refers, is general; if the draftsman had intended to limit the applicability of the provision to the particular situation suggested by the Refunding Mortgage Trustee, it would have been natural to use specific language of limitation, such as "as to equipment hereafter acquired against which First Mortgage [1552] Bonds shall have been authenticated and delivered or their proceeds or cash deposited hereunder paid out".

Nor does adopting the interpretation set forth in the brief of the First Mortgage Trustees dated January 9, 1937, result, as suggested in the brief of the Refunding Mortgage Trustee dated September 24, 1937, in permitting the language of the paragraph following the habendum clause "to override the clear and controlling language of the granting clauses" (see page 6). The language of the paragraph following the habendum clause merely affords additional evidence of the intent disclosed by the preceding provisions of the granting clauses. The "exception clause" cannot be construed apart from its context, and the paragraph following the

habendum clause forms a part of that context.

No rule of construction is more fundamental than that the "writing will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose."* [1553].

*3 Williston on Contracts (Williston and Thompson Revised Edition), page 1779.

"The purpose of every written contract or conveyance is to express the intention of the parties thereto. The object of all construction of the terms of a mortgage or agreement is to ascertain that intention. That intention must be deduced from the entire mortgage or contract and the situation and circumstances of the parties when they made it. That intention when ascertained must prevail over the dry words of the instrument, inapt expressions, and careless recitals in the mortgage or agreement unless it is directly contrary to the plain meaning of the binding words of the instrument. *United States Fidelity & G. Co. vs. Board of Commissioners of Woodson County, Kans.* 145 Fed. (CCA) 144, 145. The natural, reasonable, more obvious meaning of a mortgage or contract should be preferred to a curious recondite signification discovered by ingenuity and study." *The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al.*, (Appendix, *infra*, pages 23-24).

"Of course, the sinking fund provision should be construed not by its terms alone, but with reference to all other provisions of the mortgage. And, similarly, the mortgage should be construed not arbitrarily by its terms, but with reference to the purposes for which it was made and the objects intended and achieved in its operation." *Brown vs. Pennsylvania R. Co.*, 250 Fed. 513, 518 (C. C. A., 3rd. Circ., 1918), cert. denied, 248 U. S. 558 (1918).

An examination of the after-acquired property clauses and of the "free funds" provision of the First Mortgage discloses a clearly defined general purpose, namely, (1) to subject to the lien all after-acquired property of the character described, provided that such property falls within any one of four specifically enumerated categories,* and (2) to permit the Debtor, through the use of its credit or free funds, to acquire free of the lien any such property which does not fall within one of the four specifically enumerated categories.

The language used on pages 17-18 of the First Mortgage to define the extent of the after-acquired property clauses is substantially identical with the language used on pages 21-22 (preceding the "exception clause") to define the limitations upon the Debtor's right to acquire property free of the lien. The language used is not contradictory; it is complementary. The after-acquired property clauses and the "free funds" provision, when placed side by side, fit together like the two parts of an ancient

*The categories enumerated are as follows:

(1) Property on account of which First Mortgage Bonds or deposited cash shall have been taken down;

(2) Property constituting an integral part of the mortgaged property;

(3) Property used or acquired for use in or for the maintenance or operation of or appertaining to any of the mortgaged property; and

(4) Securities of certain corporations.

parchment indenture and indicate clearly the general purpose above stated.

The "exception clause" appears at the end of the paragraph containing the "free funds" provision. It is a part of the sentence which sets forth the limitations upon the Debtor's right to acquire property free of the lien, and it is connected with the preceding part of the sentence by the conjunction "and". There is therefore a strong presumption that the "exception clause" [1554] was not intended to be inconsistent with the general purpose evidenced in the preceding part of the sentence.

The "exception clause" was obviously inserted to meet the requirements of a particular situation of great practical importance—the necessity of permitting the Debtor to finance purchases of equipment through loans secured by liens upon the equipment purchased. To that end it was essential to empower the Debtor to make effective pledges of the equipment—whether under the ordinary form of equipment trust or conditional sale agreement or under some form of chattel mortgage—as security for the advances obtained. There is no reason to believe that the draftsman of the First Mortgage sought to accomplish anything more. To accomplish that result, consistently with the general purpose above stated, it was only necessary to suspend the operation of the after-acquired property clauses to the extent required to vest an unencumbered security title in the equipment lienor; it was not neces-

sary also to prevent the lien of the First Mortgage from attaching to the Debtor's equity in such equipment, and such a result would be inconsistent with the general purpose above stated.

The First Mortgage Trustees believe that the "exemption clause" should be given a meaning consistent with the general purpose above stated, and they believe that the granting clauses and the paragraph containing the "free funds" provision, on pages 21-22 of the First Mortgage, when read as a whole, have the effect of subjecting to the lien of the First Mortgage the Debtor's equity in the equipment covered by the three equipment trusts and the Baldwin Lease. [1555]

(b) The Absence from the First Mortgage of the Proviso Appearing in the Refunding Mortgage.

The Refunding Mortgage Trustee further contends that the absence from the First Mortgage of language such as appears in the proviso on pages 22-23 of the Refunding Mortgage is of "controlling significance" (see brief of the Refunding Mortgage Trustee dated January 11, 1937, page 51).

The First Mortgage Trustees believe that the construction of the provisions of the First Mortgage must be governed exclusively by the terms of that instrument, without reference to the terms of the Refunding Mortgage. As pointed out above (pages 3-8), the First Mortgage Trustees believe that, under the proper construction of the granting clauses of the First Mortgage, the Debtor's equity in the equipment in question is subject to the lien of the

First Mortgage. It is not perceived how this result can be deemed to be affected by the chance circumstance that the draftsman of a mortgage executed nearly sixteen years later considered it appropriate to insert in that instrument additional language not appearing in the First Mortgage.

(c) The Listing Application of December 21, 1931.

The Refunding Mortgage Trustee further contends that certain language appearing in the Listing Application of December 21, 1931 (Exhibit 112), indicates a practical construction of the First Mortgage as not covering the Debtor's equity in the equipment under discussion (see brief of Refunding Mortgage Trustee dated January 11, 1937, pages 48-49).

The Listing Application, however, at most indicates the construction placed upon the First Mortgage by the [1556] Debtor, which is the party beneficially affected by such construction. There is nothing in the record to indicate that either the First Mortgage Trustees or the First Mortgage Bondholders—the parties adversely affected—acquiesced in such construction. It is difficult to understand how the meaning of a contract can be deemed to be governed by a purely unilateral construction placed upon it by the party beneficially affected, without such construction being acquiesced in by the parties adversely affected.

“Contemporary construction of a contract by acts of the parties is entitled to very great weight, but it ought to appear with reasonable

certainly that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are now sought to be applied. In the present case there was no ratification shown, or even knowledge, of the entries as to taxes, which was sufficient to establish a construction by the parties."

Kane v. Schnylkill Fire Ins. Co., 48 Atl. 989 (Pa., 1901); cited with approval in Sternbergh v. Brock, 74 Atl. 166 (Pa., 1909) at page 169.

See also:

N. F. I. Bridge Co. v. Grand Trunk Ry. Co., 241 N. Y. 85 (1925).—

Kinney v. McBride & Co., 88 App. Div. 92 (N. Y., 1903).

On page 53 of the brief of the Refunding Mortgage Trustee dated January 11, 1937, appears a quotation from the opinion of Judge Sanborn in *The Equitable Trust Company of New York, Trustee, v. The Wabash Railroad Company, et al.* (see Appendix, *infra*, page 28) containing a statement of the doctrine of practical construction. [1557] It should be noted, however, that the facts relied upon by Judge Sanborn in that case as indicating a practical construction of the mortgage there under consideration showed that the construction adopted had been acquiesced in by the parties adversely affected (see Appendix, *infra*, pages 28-29).

To give to the Listing Application the effect claimed by the Refunding Mortgage Trustee would amount to adopting the fantastic proposition that

the lien of the holders of outstanding bonds can be changed or made to vanish by the mortgagor company inserting a statement in a listing application which the bondholders may never have seen or heard of.

(d) Judge Sanborn's Opinion in *The Equitable Trust Company of New York, Trustee, v. The Wabash Railroad Company, et al.*

The brief of the Refunding Mortgage Trustee dated January 11, 1937, quotes (at pages 53-54) excerpts from the above mentioned opinion (which is apparently unreported) but does not set forth the full text of the opinion. For the convenience of the Commission, the text of that portion of the opinion which deals with the question of after-acquired equipment is set forth in the Appendix to this brief.

The Refunding Mortgage Trustee, in its brief above-mentioned, recognizes that the "general language in the Wabash mortgage is not sufficiently close to the language in the present First Mortgage to justify an extended discussion thereof" (page 52), and apparently cites the case only in support of two propositions: (1) the doctrine of practical construction, and (2) a rule of construction based upon the position of what Judge Sanborn calls the "reservation paragraph" (in terms reserving to the [1558] mortgagor company the right to acquire certain kinds of property free of the lien*) in the

*The "reservation paragraph" in the Wabash mortgage may be said to correspond roughly with the "free funds" provision in the First Mortgage, but the language of the two provisions differs so radically as to make a comparison unprofitable.

Wabash mortgage at the end of the property descriptions and just before the habendum paragraph.

The effect of the doctrine of practical construction has already been discussed (*supra*, pages 9-11). As regards the rule of construction based upon the position of the "reservation paragraph", it should be pointed out that we are not here dealing with a situation in which specific contradictory language in a "reservation paragraph" is relied upon to cut down the effect of broad general language in the preceding provisions of the granting clauses. As stated above (*supra*, pages 6-7), the language of the granting clauses of the First Mortgage and the language of the paragraph defining the right of the Debtor to acquire property free of the lien are not contradictory but complementary and, when read together, clearly indicate the intent of the parties. In view of this fact, the rule of construction mentioned in Judge Sanborn's opinion is of little help in ascertaining that intent.

II.

The Conclusions in the Report Are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to the Northern California Extension and with Respect to the Various Branches and Spurs.

The First Mortgage Trustees believe that the Report is correct in concluding that the First Mortgage is a first [1559] lien upon the entire Northern

California Extension and upon the various branch lines, spurs and industrial tracks. The questions involved are fully discussed in the brief of the First Mortgage Trustees dated January 9, 1937, at pages 4-48. (as to the Northern California Extension), at pages 48-54 (as to the branch lines), and at pages 54-57 (as to the spurs and industrial tracks). They are also discussed in the brief of the Institutional Committee dated January 9, 1937, at pages 44-52..

The Refunding Mortgage Trustee contends, in its brief dated September 24, 1937 (pages 9-12), that the lien of the Refunding Mortgage ranks equally with the lien of the First Mortgage upon the Northern California Extension and upon all branches, spurs and industrial tracks and the construction or acquisition of which was financed only in part with First Mortgage Bonds or deposited cash.

The argument advanced in support of this contention overlooks the fact that the bond take-down provisions of the First Mortgage do not permit the bonding of property unless the property bonded becomes subject in its entirety to the lien of the First Mortgage (see brief of the First Mortgage Trustees dated January 9, 1937, pages 26-27). In view of this requirement, there can be no merit in the argument that the provision on page 17 of the First Mortgage has the effect of making the First Mortgage a lien on property bonded only to the extent of the First Mortgage Bonds or deposited cash taken down.

The argument advanced by the Refunding Mortgage Trustee also overlooks the covenant contained

in Section 13 of Article Fourth of the First Mortgage (page 79), which reads as follows: [1560]

"In case the Company shall hereafter mortgage any of the property which is, or by the terms hereof purports to be or which is intended to become, subject hereto, such mortgage shall be, and shall be expressed to be, subject to the prior lien of this indenture for the security of all First Mortgage Bonds then or thereafter to be outstanding hereunder."

In the face of this covenant, it is impossible to construe the after-acquired property clauses of the First Mortgage as creating a lien ranking merely *pari passu* with the lien of a subsequently executed mortgage on property financed only in part with First Mortgage Bonds or deposited cash. If the lien of the First Mortgage attaches at all to the property, it clearly attaches as a first lien upon the property in its entirety and is prior in every respect to the lien of the subsequently executed mortgage.

Inasmuch as the Refunding Mortgage by its terms (page 23) is made expressly subordinate to the lien of the First Mortgage, there can be no basis for any claim that the lien of the Refunding Mortgage ranks equally with the lien of the First Mortgage upon any property which is subject to the lien of the First Mortgage.

The Refunding Mortgage Trustee also contends, in its brief dated September 24, 1937 (page 9), and in its brief dated January 11, 1937 (pages 56-57 and

59-61), that certain branch lines, aggregating in length some twenty-three miles, and certain spurs and industrial tracks are free of the lien of the First Mortgage, because (it is asserted) their purchase, acquisition or construction was not financed by the use of First Mortgage Bonds or deposited cash.

With respect to these branch lines, the record shows that deposited cash was withdrawn to finance expendi- [1561] tures upon all of them, with the exception of only two, namely, the Glannvale-Bradford Winery Branch, which is about 1.6 miles long, and the Spanish Creek Spur, which is about 0.6 miles long.

The Refunding Mortgage Trustee contends that the use of First Mortgage Bonds or deposited cash to finance the making of additions and betterments to branch lines (as distinguished from the purchase, acquisition or construction thereof) is insufficient to subject such branch lines to the lien of the First Mortgage. This contention ignores the express language of Clause Third of the granting clauses of the First Mortgage (page 17), which provides in effect that after-acquired branches shall become subject to the lien of the First Mortgage if First Mortgage Bonds or deposited cash shall be taken down "on account of the purchase, acquisition or construction thereof *or work thereon*" (Italics ours). This contention also ignores the fact that, as stated above (page 13), the bond take-down provisions of the First Mortgage do not permit the bonding of

property unless the property bonded becomes subject in its entirety to the lien of the First Mortgage.

Moreover, it is clear that all of these branch lines constitute integral parts of the main line or are used in the maintenance or operation of the main line and are therefore subject to the lien of the First Mortgage (see page 17 of the First Mortgage), irrespective of whether or not their purchase, construction or acquisition was financed by the use of First Mortgage Bonds or deposited cash.

As regards the spurs and industrial tracks, the record shows that very substantial amounts of deposited cash were withdrawn under the First Mortgage to reimburse expenditures for the construction of numerous spurs, industrial tracks, and similar tracks located on [1562] various parts of the mortgaged lines. Furthermore, spurs, industrial tracks, and other similar tracks are, by their very nature, so inseparably connected with the mortgaged lines, and with their use and operation, that they clearly constitute an integral part of them. It therefore seems clear that all of the spurs, industrial tracks, and other similar tracks owned by the Debtor are subject to the lien of the First Mortgage, (1) because they are integral parts of the mortgaged lines, used in their maintenance and operation and appurtenant to them, and also, at least as to the substantial part of them, (2) because they were financed in whole or in part by the use of deposited cash under the First Mortgage.

III.

The Conclusions in the Report Are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to Non-Carrier Real Estate.

(a) With Respect to Non-Carrier Real Estate Acquired Prior to the Execution and Delivery of the First Mortgage.

The Refunding Mortgage Trustee contends, both in its brief dated September 24, 1937 (pages 13-14), and in its brief dated January 11, 1937 (pages 65-69), that non-carrier real estate acquired prior to the execution and delivery of the First Mortgage is not subject to the lien thereof, because the plan of reorganization of the old Western Pacific Railway Company, dated December 15, 1915, provided that the First Mortgage Bonds were to be secured, inter alia, by a first mortgage upon all of [1563] the "existing railway properties" of the Debtor's predecessor.*

*Article XIX of the Plan of Reorganization above referred to reads as follows:

"Statements Contained in Plan.

"This Plan has been adopted by the Protective Committee, acting under the Protective Agreement. The statements contained in the Plan have been compiled from sources believed to be reliable and accurate, but certain of them are necessarily approximate and none is to be construed as a repre-

Subdivision VII of the granting clauses of the First Mortgage (pages 15-16) covers the following property:

"All and singular the property, interests and rights, (except cash, accounts and bills receivable, traffic and other operating balances and other cash items) not comprised in the descriptions contained in the foregoing subdivisions of this clause First of these granting clauses, which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by Western Pacific Railway Company or to which said company was or its receivers were entitled."

The language used is clear and free from ambiguity. It plainly includes all non-carrier real estate acquired by the Debtor from its predecessor, the Western Pacific Railway Company. The provisions of the plan of reorganization are inadmissible to contradict the clear and unambiguous provisions of the First Mortgage.

(b) With Respect to After-Acquired Non-Carrier Real Estate.

The arguments advanced by the Refunding Mort-

sentation or as an inducement to any action or to any omission to act upon the part of anyone. No error or misstatement of any description in the Plan shall constitute ground for the withdrawal of any Depositor from the Plan and Agreement nor for any complaint with respect to the same or with respect to any consequences arising from having become a party thereto." (Italics ours.) [1564]

gage Trustee in support of its contention that after-acquired non-carrier real estate is not subject to the lien of the First Mortgage are set forth at pages 14-15 of its brief dated September 24, 1937, and at pages 63-65 of its brief dated January 11, 1937. The questions involved are fully discussed at pages 57-62 of the brief of the First Mortgage Trustees dated January 9, 1937. They are also discussed in the brief of the Institutional Committee dated January 9, 1937, at pages 53-55.

The after-acquired property clauses of the First Mortgage are not limited to property actually used for transportation purposes, and the fact that the Debtor, in its reports to the Commission, characterized certain property as being for "non-carrier purposes" does not affect the question of the scope of the after-acquired property clauses of the First Mortgage. Moreover, the record shows* that most, if not all, of the major items which the Debtor reported to the Commission as "non-carrier" property were originally carried on the books of the Debtor as "carrier" property and were subsequently transferred from Account 701, which is the account entitled "Investment in Road and Equipment." The items so transferred include both property acquired prior to the date of the execution and delivery of the First Mortgage and property acquired subsequent to that date.

* See Exhibit 12, Exhibit 31 (sheets 208, 233, 252, 273, 277, 278, 280, 281, and 284) and Exhibit 113 (footnote, page 4).—[1565]

The after-acquired property clauses of the First Mortgage (page 21) cover property "acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject * * * to the lien of this indenture." It is difficult to understand how the lien of the First Mortgage upon property which had become subject thereto could be destroyed by a subsequent change in the accounting classification under which the property was carried upon the books of the Debtor.

IV.

Any Property of the Debtor Which May Be Free of the Lien of the First Mortgage Is of Insufficient Value Materially to Affect the Fairness of Any Plan.

The Refunding Mortgage Trustee, in support of its contention that the holders of Refunding Mortgage Bonds are entitled to more favorable treatment than is accorded them in the Plan proposed in the Report, sets forth at page 17 of its brief dated September 24, 1937, a list of property which the Refunding Mortgage Trustee claims is free from the lien of the First Mortgage. This list includes certain branch lines, spurs and industrial tracks, and non-carrier real estate, as well as certain cash and other collateral pledged under the Refunding Mortgage and certain cash in the hands of the Debtor at the date of the institution of the reorganization proceedings.

As regards the branch lines, spurs and industrial tracks; and non-carrier real estate, the questions involved have been discussed above at pages 12-16 (as regards branch lines, spurs and industrial tracks) and at pages 16-19 (as regards non-carrier real estate).

As regards the cash and other collateral pledged under the Refunding Mortgage, the questions involved are discussed at pages 69-71 of the brief of the First Mortgage Trustees dated January 9, 1937. They are also discussed at pages 58-63 of the brief of the Institutional Committee dated January 9, 1937. It is not believed that any cash or other collateral which the Refunding Mortgage Trustee may hold free of the lien of the First Mortgage is of sufficient value to affect, in any material degree, the fairness of any plan. [1566]

As regards the cash in the hands of the Debtor at the date of the institution of the reorganization proceedings, the questions involved are discussed at pages 68-69 of the brief of the First Mortgage Trustees dated January 9, 1937. They are also discussed at pages 55-56 of the brief of the Institutional Committee dated January 9, 1937. So far as the record discloses, no part of this cash now remains on hand.

Conclusion.

The First Mortgage Trustees ask that the Commission approve the conclusions in the Report with respect to the extent and priority of the lien of the First Mortgage.

Opportunity for oral argument is respectfully requested.

Respectfully submitted,

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WEBB,

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ORVILLE W. WOOD,
W. CROSBY ROPER, JR.,
Of Counsel. [1567]

APPENDIX

Memorandum Opinion of Judge Sanborn in "The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al."*

*We do not have a certified copy of this opinion. The transcript set forth in this Appendix was made from a copy furnished by counsel for Wabash Railway Company, which we believe to be correct.

In the
United States District Court
for the Eastern District of Missouri
In Equity No. 3977
Filed Nov. 7th, 1921

THE EQUITABLE TRUST COMPANY OF
NEW YORK

Trustee,

vs.

THE WABASH RAILROAD COMPANY and
JAMES B. FORGAN

Defendants.

IN THE MATTER OF THE INTERVENTION
OF ROME LANE, ET AL., AND OF THE
EXCEPTIONS TO THE REPORT OF
BYRON F. BABBIT, ESQUIRE, SPECIAL
MASTER HEREIN.

Mr. Wells H. Blodgett, for Receivers under the
Creditors' bill.

Mr. Clifford B. Allen and Mr. Lee W. Hagerman,
(Mr. P. H. Cullen was with them on the Brief)
for the interveners.

Mr. James L. Minnis for the defendants. [1568]

Mr. N. S. Brown for the Wabash Railway Company,
the purchaser at the foreclosure sale, (Mr.
Winslow S. Pierce and Mr. Lawrence Greer,
were with him on the brief.)

Sanborn, Circuit Judge.

It is not intended by this memorandum to discuss
or even state the many serious questions presented

by the exceptions to the Master's Report, or to do more than to indicate the views of the court upon a few of the issues.

* * * * *

II.

Interveners' Claim on Account of the Seventy Locomotives.

The Railroad Company in October 1907 entered into an equipment trust agreement for the purchase of seventy locomotives. The refunding mortgage was made on July 1, 1906. Prior to the filing of the foreclosure bill the Railroad Company had paid \$852,240.55 for these locomotives according to the terms of the trust agreement. The unpaid balance thereunder, \$399,000.00 was paid by the receivers and charged in their reports against the proceeds of the unmortgaged assets of the railroad company. After the foreclosure decree, but before the sale, a bill of sale of these locomotives was made to the mortgagor company by the trustee of the equipment trust. Although there was no allegation in the foreclosure bill, all the averments of which were admitted by the answer of the mortgagor, that these locomotives were a part of the mortgaged property, although the special master in the consolidated cause, in pursuance to an order of the court to ascertain and report the mortgaged property, [1569] did not report these locomotives as a part thereof while he did so report other rolling stock subject to equipment trust agreements, and although these locomotives were not specifically described in the

decree or notice of sale, the receivers delivered them to the Wabash Railway Company, the actual purchaser at that sale. The interveners insist that these locomotives were not subject to the refunding mortgage, but were in equity subject to the trust for the benefit of themselves and the other unsecured creditors that was fastened upon them by the filing of the creditors' bill, that the railway company took them subject to that trust, and that the interveners and their associates are entitled to an accounting for these locomotives by the railway company.

The Special Master in his report held that this property was not covered by the refunding mortgage, and that the interveners as against the railway company, were entitled in equity to the \$852,240.55 paid for them by the mortgagor before the receivership or to an interest in them in the proportion which that amount bears to the whole amount paid for them. Upon exception to this conclusion by the Railway Company and after hearing further testimony and argument he concluded that these locomotives were subject to the refunding mortgage and that the interveners were entitled to no relief on account of this claim.

The question is—did the refunding mortgage subject these locomotives to its lien? The purpose of every written contract or conveyance is to express the intention of the parties thereto. The object of all construction of the terms of a mortgage or agreement is to ascertain that intention. That intention must be deduced from the entire mortgage or con-

tract and the situation and circumstances of the parties when they made it. That intention when ascertained must prevail over the dry words [1570] of the instrument, inapt expressions, and careless recitals in the mortgage or agreement unless it is directly contrary to the plain meaning of the binding words of the instrument. *United States Fidelity & G. Co. vs. Board of Commissioners of Woodson County, Kans.* 145 Fed. (CCA) 144, 145. The natural, reasonable, more obvious meaning of a mortgage or contract should be preferred to a curious recondite signification discovered by ingenuity and study.

This refunding mortgage of July 1, 1906 was authorized by a resolution of the Board of Directors of the Railroad Company, which provided that the bonds issued under it should be secured by "A mortgage or deed of trust covering and embracing all of the railroads and property now owned by the company, and all other property hereafter acquired by it through the issue of said bonds or their proceeds, as well as all other property which may from time to time be expressly conveyed, assigned or pledged, or by writing of any kind transferred to the trustee of said mortgage or anyone in its behalf." The seventy locomotives in question were not thereafter acquired by the railroad company through the issue of the bonds secured by that mortgage or by their proceeds, nor were they ever expressly assigned, conveyed or mortgaged to the trustee, so that it is reasonably clear that they never fell

into any of the classes of property which the railroad company intended to subject to the mortgage when its Board of Directors passed this resolution which authorized it.

The refunding mortgage granted to the trustees named therein, the railroads of the mortgagor by a specific description of each of them, and, among other things "also all property of every kind and description, real, personal, or mixed, stocks, interests, rights, privileges and franchises now owned by the railroad com- [1571] pany or hereafter acquired by it, and which may be or become subject to the lien of any of the mortgages of the railroad company herein before recited." One of the mortgages therein recited was the mortgage of May 1, 1889, which contained a grant to the trustee for its bondholders of the railroads therein specified "and all other things, real and personal, now owned or used or that may hereinafter be owned or used by the party of the first part in connection with said lines of railroad or appertaining thereto." It is contended that the seventy locomotives which were purchased in October, 1907, more than a year after the date of the refunding mortgage, under the equipment trust agreement whereby the title was retained in the vendor until the purchase price was paid years thereafter, fell under that portion of the refunding mortgage above quoted, which reads: "or hereafter acquired by it, and which may be or become subject to the lien of any of the mortgages of the railroad company herein before recited", and became subject

to that mortgage because they came within that part of the quotation from the mortgage of July 1, 1889 which describes property "that may hereafter be owned or used by the party of the first part in connection with said lines of railroad or appertaining thereto." This contention, however, seems to invoke an unauthorized stretch or extension of the grant of the refunding mortgage beyond the intention of the parties to it therein expressed. It is evident that the draftsman of that mortgage was not of the opinion that the interest of the mortgagor in locomotives and other rolling stock then held by it under equipment trust agreements, was included in the terms which have been quoted; much less the interest the mortgagor might thereafter acquire in property under such agreements; [1572] for the third paragraph of the mortgage quoted reads in this way: "Also, subject to the provisions hereinafter in this indenture contained all the right, title and interest which the railroad company now has or hereafter may acquire in and to all rolling stock now covered by the equipment agreements herein before recited." That paragraph in all probability would never have been written and inserted in the mortgage if the draftsman had supposed that he had covered the interests of the mortgagor therein described by the preceding paragraphs quoted, and it is clear that he did not intend to include or subject to the mortgage, by any of the paragraphs quoted, interests in locomotives, rolling stock, or equipments thereafter acquired under equipment trust

agreements, for, if that had been his intention, the matter would have come to his attention when he wrote the paragraph last quoted, and he would have included them in that paragraph. The paragraphs of the refunding mortgage to which reference has been made, and which have been considered, fail to satisfy that the parties to the refunding mortgage intended to subject to that mortgage the seventy locomotives thereafter acquired by the mortgagor under the equipment trust agreement.

But, supposing that the paragraph quoted from the mortgage of July 1, 1889, is broad enough to cover the interest which the mortgagor secured in the seventy locomotives in October 1907 and thereafter under the equipment agreement; and supposing that the provision of the refunding mortgage covering property of the mortgagor "hereafter acquired by it and which may be or become subject to the lien of any of the mortgages of the railroad company hereinbefore recited" was sufficient, standing alone, to include the after-acquired interest in the seventy locomotives. Nevertheless, it was [1573] competent for the parties to that mortgage, by a stipulation therein, to except that interest from the lien thereof. They could have done so by the addition thereto of the clause "Except that property acquired by the mortgagor otherwise than by the use of the proceeds of the bonds secured by this mortgage shall not become subject to the lien thereof unless made so by a subsequent written instru-

ment", and for this purpose, as it seems to the court, they did insert, after all the numerous descriptions of the mortgaged property and just preceding the habendum clause of the mortgage, this reservation covenant and agreement: "But it is hereby covenanted and agreed that the Railroad Company reserves the right, except as in this indenture expressly otherwise provided, to acquire or construct any railroad, branch or extension and to acquire any stocks, bonds, securities and other property of any kind and description free from the lien of this indenture and any railroad, branch or extension and any stocks, bonds, securities and other property of any kind or description, acquired by the Railroad Company without the use of bonds or proceeds of bonds issued hereunder or constructed or acquired by the use of any such bonds or the proceeds of any such bonds as may be delivered to the Railroad Company as hereinafter provided in reimbursement of expenditures then already made out of other resources for purposes for which bonds secured by this Indenture are hereinafter provided to be issued, shall, except as in this Indenture expressly otherwise provided, be free from the lien of this Indenture unless specifically subjected thereto by an instrument in writing executed by the Railroad Company or by any one with its consent on its behalf to the Trustee hereof," A comparison of this reservation with the resolution which warranted the mortgage is very persuasive that both [1574] parties to that instrument

had the abiding intention and settled purpose which was clearly expressed in that resolution to leave such after acquired property as these seventy locomotives, which was not acquired through the issue of the bonds secured by the mortgage, free of its lien unless and until such property was specifically subjected to that lien by an express conveyance, assignment, pledge, or writing such as the resolution requires or "by an instrument in writing executed by the railroad company" as the reservation paragraph describes.

This view that an intention to subject these seventy locomotives to the lien of the refunding mortgage is not evidenced by that instrument, and the situation and circumstances of the parties when they made it is strongly supported by their practical interpretation of it before the present controversy arose. The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy had arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious errors. *Topliff vs. Topliff*, 122 U. S. 121, 131; *City of Chicago vs. Sheldon*, 9 Wall. 50, 54; *Manhattan Life Insurance Co. vs. Wright*, 126 Fed. (CCA) 82, 87.

The Equitable Trust Company, the representative of the bondholders secured by the refunding mortgage, applied in 1913 to the court in the consolidated cause to appoint a Master to hear testi-

mony, ascertain and report what property was covered by the mortgage, and the court appointed Mr. Thomas T. Fauntleroy and ordered him to take evidence, find and report what property was subject to the mortgage. He received testimony and reported that the mortgage covered much specifically described property, and; (1) "and all locomotives, [1575] engines, and other rolling stock * * * and all other property of every kind and description owned by the railroad company at the time of the execution and delivery of said refunding mortgage appurtenant to and used with the lines of road, and; (2) all extensions, branches, equipment, terminals and other property of every nature acquired by said railroad company through the use of the bonds secured by said first refunding and extensions mortgage or the proceeds thereof." He did not, however find or report that this mortgage covered the interest of the mortgagor in these seventy locomotives. It is common knowledge that the Equitable Trust Company, through its counsel, presented the evidence and claim of the Bondholders to the property which they deemed covered by this mortgage to the Special Master and the obvious inference from this hearing and the report of the Master is that neither the mortgagee, the mortgagor, nor the Master was of the opinion that the railroad company intended to mortgage or did mortgage the interest of the mortgagor in these seventy locomotives, which was acquired through the equipment trust agreement of 1907.

In opposition to the considerations which have been recited counsel for the defendant earnestly contends that these locomotives do not fall under the reservation paragraph because it contains the words "except as in this indenture expressly otherwise provided" and the mortgagor had in a previous part of this mortgage granted all property thereafter "acquired by it and which has become or may become subject to the lien of any of the mortgages of the railroad company herein before recited." But this exception in the mortgage covers only dispositions therein before "expressly otherwise provided;" that is to say "in an express, direct or pointed [1576] manner; of set purpose; in direct terms; plainly; explicitly." Century Dictionary, 2087, and in view of the facts that the clause of the grant invoked is so general and indefinite, that the mortgage contains an express grant of the interest of the mortgagor in all rolling stock covered by equipment trust agreements therein recited but no express grant of any interest that it should thereafter acquire in locomotives under equipment trust agreements, the court is unable to conclude that it was anywhere in that mortgage "expressly otherwise provided" than as it was provided in the other parts of the reservation paragraph.

Another contention of counsel for the defendant and that which persuaded the Master to reverse his opinion finding that the seventy locomotives were

not subject to the lien of the mortgage, is that the reservation paragraph does not conflict with the granting clause of the refunding mortgage which extends its lien to after acquired property that might be or become subject to the lien of the prior mortgages recited therein because it is limited and restricted in its meaning, scope and effect to the property described in Section 4 of Article II of the refunding mortgage which provides that \$110,260,500.00 par value of the bonds secured by the mortgage shall be issued and used for certain specified purposes only and the acquisition of locomotives under equipment trust agreements is not one of the purposes so specified. But (1) if the granting parts of the mortgage fail to evidence an intention of the parties to subject after acquired locomotives, procured through equipment trust agreements, to the lien of the refunding mortgage, they were not subjected thereto by the reservation paragraph, and the question presented by this contention becomes immaterial; (2), if, on the other hand the granting clauses do evidence such an intention, the position of the reservation para- [1577] graph in the mortgage after all the descriptions of the property granted and just before the habendum paragraph, its independent, clear and sweeping covenant in these terms: "but it is hereby covenanted and agreed that the railroad company reserves the right, except as in this indenture expressly otherwise provided, to acquire or construct any railway, branch, or extension and to acquire

any stock, bonds and other property" not other property of the kinds therein described; but "of any kind and description free from the lien of this indenture" etc., and the evident purpose of this paragraph to carry out thereby the intention expressed in the authorizing resolution seem to the court, to converge with almost compelling force to persuade that the construction which this contention seeks to apply to the reservation never was intended by the parties to it, and; (3) the provisions of Section 4, Article II relate to property purchased or to be purchased by the use of the proceeds of the bonds to be issued and to the application of those proceeds. The reservation paragraph relating to property not purchased or to be purchased by means of such bonds or proceeds, was evidently put into the mortgage for the purpose of preventing such property from falling under the lien thereof unless so placed by a subsequent written agreement, and it does not seem probable that the provisions of Section 4, regarding property, of which the locomotives are not a part, were intended to restrict the reservation of property not procured by means of the bonds.

In his final conclusion the Master suggested, as one reason therefor, that these locomotives, which he had held in his original report, had not been acquired by the railroad company by the execution of the trust agreement were subsequently acquired after the decree and before the sale by a bill of sale of the trustee in the equipment agreement. But it

seems to the court that this change [1578] in the situation is immaterial. It is inclined to the view that if the lien of the refunding mortgage had ever attached to the locomotives it would have attached to the equitable interest of the mortgagor at the time it commenced to pay for them under the agreement, and would have increased with the increase of the payments.

In the consideration of this claim the court has received great assistance from the able and exhaustive arguments and briefs of counsel for each of the parties and from the studied and comprehensive report of the Master. All these have received examination and reflection, with the result that the entire mortgage the parts thereof specified and discussed, the situation and circumstances of the parties when they made the mortgage, the resolution which authorized it and the practical interpretation of it by the parties before this controversy arose, and other considerations which have been referred to herein, have led to the conclusion that the parties to the refunding mortgage never intended thereby to subject, and did not subject, after acquired locomotives purchased, by means of equipment trust agreements to the lien of that mortgage; that the interveners are entitled to an accounting by the Wabash Railway Company for those locomotives and their use by it, and to equitable and just relief on account thereof.

* * *

[Endorsed]: Filed Oct. 5, 1939. [1579]

Before the
Interstate Commerce Commission
Finance Docket No. 10913.

In the Matter of THE WESTERN PACIFIC
RAILROAD COMPANY,

Debtor.

REPLY OF THE RAILROAD CREDIT COR-
PORATION TO THE EXCEPTION
BRIEFS FILED HEREIN ON OR BE-
FORE SEPTEMBER 27, 1937.

There appears to be no substantial difference be-
tween the position taken by the A. C. James Co.
and the position taken by the R.F.C. and The Rail-
road Credit Corporation in their respective excep-
tions (and supporting briefs) in relation to the
treatment proposed by the Bureau of Finance for
their several claims.

All agree on the underlying principles:

(1) That every creditor is entitled to such
priority with respect to the Debtor's estate, as
derives from the security which he holds.

(2) That if a secured creditor is not fully
secured, he is to be treated as a general cred-
itor for the amount of the deficiency, or un-
secured portion of his claim.

(3) That every creditor is entitled to be
paid in full in money or moneys worth, before
any part of the Debtor's estate is allocated, in
cash or new securities, to junior claimants,

whether they be creditors or stockholders, unless such junior claimant furnishes an adequate new consideration. (Obviously it would be proper to admit strangers on this basis.)

Apparent rather than real differences arise in the application of these principles to the facts in this proceeding:

The claims of the Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Co. are each secured by General and Refunding Bonds of the Debtor in varying amounts. (The Reconstruction Finance Corporation [1581] and The Railroad Credit Corporation each holds additional security, but for simplification consideration of that security is deferred to a later point in this memorandum.) If those General and Refunding Bonds were completely junior to the First Mortgage, it would be clear that their holders would not be entitled to receive anything from the estate of the Debtor, either in cash or new securities, until the First Mortgage Bondholders had been satisfied. A fortiori those junior to the General and Refunding Mortgage would be entitled to nothing until that Mortgage had been satisfied. It appears, however, that the General and Refunding Mortgage is not in all respects junior to the First Mortgage. It can not be said, even tentatively, that the First Mortgage is entitled to look to the entire estate of the Debtor ahead of the General and Refunding Mortgage.

The Bureau of Finance states in its proposed

report that after the First Mortgage has been given all that the Bureau believes that Mortgage is entitled to receive, the value remaining in the estate of the Debtor will be sufficient to support approximately \$21,000,000 par value of common stock (in addition to the approximately \$8,000,000 of common stock to be issued to cover unpaid interest on First Mortgage Bonds), and that approximately only \$11,000,000 par value of that stock is available for General and Refunding Bonds. Assuming this to be true, it follows that the holders of those bonds are entitled to their pro rata share of that stock, up to the full amount of their claims. If their pro rata shares are insufficient to satisfy their claims, deficiencies will result. If an assignment of two shares of stock for \$100 of claim is not excessive, as indicated in the Bureau's proposal, with respect to Reconstruction Finance Corporation, then assignments of lesser amounts of stock, as in the case of The Railroad Credit Corporation and A. C. James Company, necessarily leave deficiencies.

[1582]

If there is no remaining asset value, then no further stock should be issued, and the deficiencies must be wiped out, along with the claims of general creditors and stockholders.

The A. C. James Company argument is based on the assumption, which we believe is amply supported, that there is additional value in the Debtor's estate sufficient to satisfy these deficiencies. Whether or not sufficient value does in

fact exist, remains to be determined, but it is clear that substantial additional value has been found by the Bureau to exist, for it proposes to issue \$10,000,000 of common stock as a bonus. That stock, unless paid for (by a creditor, stockholder, or third party, it is immaterial which), must be distributed among the note holders to the extent necessary, if it is more than sufficient, otherwise in its entirety, towards satisfaction of the deficiencies above referred to.

Thus the arguments advanced by A. C. James Company, Reconstruction Finance Corporation, and The Railroad Credit Corporation, in this respect are based on the same principles of law, and all tend to the same end—with but one point of difference: the Reconstruction Finance Corporation and The Railroad Credit Corporation contend that the stock proposed to be issued to them will be worth substantially less than \$50 per share, and that in consequence deficiencies will exist. This low valuation of the new stock is supported by the Bureau's proposed report, as above shown. The A. C. James Company, however, appears to assume, in spite of the record and the action of the Bureau, that the new common stock *will* be worth \$100 a share, or so nearly that amount that there is an excess of collateral held by Reconstruction Finance Corporation. If the A. C. James Co. is right about the value of the new stock, then it is right in its conclusion, but its valuation finds no support in the Bureau's figures. The Railroad Credit Corporation

contends that if the full value of General and Refunding Bonds were recognized, both R.F.C. and The Railroad Credit Corporation would have an excess [1583] of collateral, but on the basis of exchange proposed by the Bureau, no excess could exist. (Here again no consideration is given to the additional collateral held by The Railroad Credit Corporation).

In other words, the Reconstruction Finance Corporation and The Railroad Credit Corporation see sufficient value in their existing collateral to warrant issuing to them new securities equal in value to their respective claims, and they regard the stock allocated to them as inadequate. The A. C. James Co. also believes that present collateral note claims, including its own, are fully secured, but it sees sufficient value in the new common stock to satisfy those claims, provided the new stock is allocated in proportion to the amounts of the several claims. Thus, the only issue between them is as to the *value* of the new stock. A conclusive answer would seem to be found in the Bureau's proposed report, unless substantially greater value is assigned to the Debtor's estate. In that event, a different distribution would be required.

The Railroad Credit Corporation holds as security for its claim, valuable items of collateral in addition to General and Refunding Bonds; its right to that collateral is a substantive property right that can not be taken away from it without due process of law, or just compensation. Reference is

made to the Brief of The Railroad Credit Corporation for a more extended discussion of the value of that collateral.

It is idle to dismiss these difficulties, as the Bondholders' Committee seeks to do at page 49 of their brief, by saying "and since R.F.C., R.C.C. and A.C.J. must, as the proposed Report correctly finds, participate as among themselves in proportion to their collateral, the participations allotted to R.C.C. and A.C.J. in respect of their Notes must be proportionately less than the participation allotted to R.F.C." That statement is, of course, true in the sense that it is true of all secured creditors, including First Mortgage Bondholders, but recognition must be given to all collateral and to all elements [1584] of value in the collateral held by the several secured creditors. The Railroad Credit Corporation has liens upon certain property of the Debtor, superior to the lien of the First Mortgage. Recognition of the rights of The Railroad Credit Corporation necessarily defeats the attempt to have the claims of First Mortgage Bondholders treated without regard to other creditors, and to relegate the claims of other creditors, including the claim of The Railroad Credit Corporation to the level of inconsequential details.

There is nothing in the record to support the suggestion that the \$2,000,000 principal amount of bonds pledged by the A. C. James Company with The Railroad Credit Corporation as security for

obligations of the Debtor, were "loaned" to The Railroad Credit Corporation, as stated on page 24 of the brief of the A. C. James Company. The evidence is clear that those bonds were pledged to The Railroad Credit Corporation, and that The Railroad Credit Corporation has all the rights of a pledgee therein.

Passim it should be noted that there is absolutely no basis in the record in this proceeding for the suggestion by the A. C. James Company, that it has any rights of subrogation or exoneration, or that there is occasion for marshaling or restitution, insofar as the aforesaid bonds are concerned. (For brief summary of law as to marshaling see 38 Corpus Juris pp. 1368 ff.)

These propositions have nothing to do with the error, assigned by all three of the collateral note holders to the Bureau proposal that stock which is to be exchanged for collateral, must be accepted, by the holders of that collateral in full discharge of the principal debts. The error of that proposal lies, insofar as private interests are concerned, primarily in its substantial failure to recognize deficiencies, or other collateral, or existing priorities, or the rights of general creditors, as has been previously pointed out. [1585]

The Bondholders' Committee, Reconstruction Finance Corporation and the A. C. James Company, all object to the offer of \$10,000,000 of common stock to the general claim of Western Pacific Rail-

road Corporation as being a discrimination in favor of The Railroad Credit Corporation, which holds that claim in pledge: The Railroad Credit Corporation admits this to be true, even though it may well be entitled, because of the collateral held by it, to that amount (or more) of additional stock. Taken by itself, the proposed offer of this \$10,000,000 par value of stock is as unsound in law as it is in economics.

The Debtor's brief at page 27 et seq. proposes a new plan of reorganization involving the issue of 15 year collateral income notes to the secured note holders. The Railroad Credit Corporation does not oppose this proposal, which may afford a practical solution, provided such notes are given upon such terms and in such amounts as to satisfy its claim in full. The proposed priority provision must be rejected as without support in law or equity. Unless made as here indicated, this new proposal can not be accepted even on composition principles in view of the treatment proposed for other creditors, and the equity holders. If The Railroad Credit Corporation is not paid in full, it is entitled to "(a) voting power and, (b) the right to participate in possible future prosperity," ahead of junior creditors and stockholders. Assigning a book value of one dollar to no par stock that carries the rights above quoted, is no justification for giving those rights to parties who no longer have any interest in the Debtor's estate. The principle of *de minimis*

can not be made to apply through the simple expedient of labeling as "minima" matters (such as those quoted) that do not in fact belong in that category.

Failure to discuss in this memorandum any proposals or principles of law or equity, or statements or conclusions of fact, to be found in any of the briefs submitted herein, in disagreement with this answer or any brief filed in behalf of The Railroad Credit Corporation is not to be taken as an acceptance, [1586] or admission of the soundness or accuracy thereof. The Railroad Credit Corporation adheres to the statements of fact and principles of law and equity set out in its several briefs herein.

The Railroad Credit Corporation unreservedly joins in the suggestion of the Bondholders' Committee stated at page 51 of their brief as follows:

"The Bureau Plan seems lacking in specification on important substantive points. To obviate any justifiable basis for such a criticism of the ultimate Plan, the Bondholders' Committee urges that before the Commission publicly announces the Plan which it will approve, it give to all the interested parties an opportunity to confer with its representatives and work out the provisions of the ultimate Plan in sufficient detail to make the security

holders an adequate disclosure of what they are voting upon."

Respectfully submitted,

D. WILLARD, JR.,

General Counsel, The Rail-
road Credit Corporation.

Office and P. O. Address:

D. WILLARD, JR.,

805 Transportation Building,
17th & H Streets, North-
west, Washington, D. C.

Dated—Washington, D. C., October 6, 1937.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each party.

Dated at Washington, D. C., this 6th day of October, 1937.

D. WILLARD, JR.,

General Counsel, The Rail-
road Credit Corporation.

[Endorsed]: Filed Oct. 5, 1939. [1587]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

**THE WESTERN PACIFIC RAILROAD
COMPANY REORGANIZATION.**

**REPLY ON BEHALF OF CROCKER FIRST
NATIONAL BANK OF SAN FRANCISCO
AND SAMUEL ARMSTRONG, AS TRUS-
TEES UNDER THE WESTERN PACIFIC
RAILROAD COMPANY FIRST MORT-
GAGE DATED JUNE 26, 1916, TO PE-
TITIONS FILED HEREIN UNDER SUB-
SECTION (d) OF SECTION 77 OF THE
BANKRUPTCY ACT.**

The above named trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916, intervenors in the above entitled proceeding, for reply to the above-mentioned petitions, respectfully state:

I.

Said First Mortgage trustees submit that the Plan of Reorganization (hereinafter called the Commission Plan) approved by the Report and Order entered herein under date of October 10, 1938, fails, in the allotment of common stock therein contemplated, to afford due recognition to the rights of the holders of bonds outstanding under said First Mortgage (hereinafter called the First Mortgage bondholders).

The Commission Plan in effect allots 154,241 shares [1589] of new common stock to the \$11,-

914,521 claim of the First Mortgage bondholders for accrued and unpaid interest to June 30, 1938, 90,255.5 shares of new common stock to the \$3,612,181 claim of the Reconstruction Finance Corporation (hereinafter called the RFC) and 33,646.5 shares of new common stock to the \$2,580,906 claim of the Railroad Credit Corporation (hereinafter called the RCC).

This allocation results in giving the First Mortgage bondholders \$129.46 of new common stock (taken at \$100 per share) for each \$100 of that portion of their claim representing accrued and unpaid interest to June 30, 1938, whereas the RFC is given \$249.86 of new common stock (taken at \$100 per share) for each \$100 of its claim and the RCC is given \$130.37 of new common stock (taken at \$100 per share) for each \$100 of its claim. Thus a portion of the claim of the First Mortgage bondholders is accorded less favorable treatment than the claims of the RFC and the RCC, notwithstanding the fact that the Commission found in its Report (pp. 59-60) that the claims of the RFC and the RCC were "not entitled to the same treatment as first-mortgage bondholders, who should be considered as having a first lien upon practically all the assets of the debtor".

II.

Said First Mortgage trustees submit that the Plan of Reorganization of the Institutional Bondholders' Committee [1590] (hereinafter called the Committee Plan), which is annexed as Exhibit A

to the petition of said Committee, provides for a fair allotment of new common stock and affords due recognition to the rights of the First Mortgage bondholders.

III.

Said First Mortgage trustees submit that the Committee Plan affords due recognition to the value and earnings of the collateral subject to the General Mortgage as a first lien.

The petition of the Irving Trust Company as trustee discusses (pp. 3-9) the values to be attributed to the collateral subject to the General Mortgage as a first lien. The figures given in the petition for the Central California Traction Company securities and for the Alameda Belt Line stock are the values carried on the books of the Debtor. It is submitted that such book values do not furnish an appropriate test of values for a plan under Section 77. Furthermore, the discussion of these securities and of this stock in the petition ignores the fact that both companies have been operating at a loss; reference is made to the brief (pp. 60-63) dated January 9, 1937, filed herein on behalf of the Institutional Bondholders' Committee, for a summary and analysis of the data in the record as to the earnings of these companies. [1591]

The petition mentions \$810,331 free cash on hand at the institution of the reorganization proceedings as something entitling the General Mortgage bondholders to favorable treatment in the reorganization. Since the shortage of cash for operation dur-

ing the reorganization proceedings was such as to require the issue of \$10,000,000 in principal amount of trustees' certificates, the cash on hand at the institution of the reorganization proceedings cannot, it is submitted, be deemed a fund available for payment to the unsecured creditors; where all the cash on hand at the institution of the reorganization proceedings is used up in the operation of the railroad, to say that, for the purpose of determining a fair distribution of securities at the end of the reorganization, unsecured creditors are entitled to credit for the cash on hand at the institution of the reorganization proceedings is to say that such creditors are entitled to credit for a nonexistent thing.

The General Mortgage bonds are held in pledge by the RFC, the RCC and the A. C. James Co. (hereinafter called the ACJ). The Committee Plan accords to the RFC special treatment in consideration of its agreement to furnish \$10,000,000 of new money. The Committee Plan allots to First Mortgage bondholders \$150 of new common stock (taken at \$100 per share) for each \$100 of that portion of their claim representing accrued and unpaid interest to January 1, 1939, but allots to the RCC \$142.86 of new common stock [1592] (taken at \$100 per share) for each \$100 of its \$2,592,113 claim (interest accrued and unpaid to January 1, 1939), and allots to the ACJ new common stock in the proportion which the General Mortgage bonds of the Debtor held by the ACJ bear to the General Mortgage bonds held by the RCC. Accordingly, this distri-

bution of common stock to the RCC and (proportionately) to the ACJ is on a basis nearly as favorable as that accorded in the distribution on said claim of the First Mortgage bondholders, which is secured by all the property on which the First Mortgage is a first lien.

Wherefore said First Mortgage trustees respectfully pray that the Report and Order of the Commission entered herein under date of October 10, 1938, be modified so as to give due recognition to the rights of the First Mortgage bondholders by the approval of the Committee Plan hereinabove referred to or otherwise as to the Commission may seem just and reasonable, and that the Commission enter such further order or orders as to it may seem just and reasonable.

Dated December 17, 1938.

CROCKER FIRST NATIONAL
BANK OF SAN FRANCISCO

and

SAMUEL ARMSTRONG,

as Trustees,

By ORVILLE W. WOOD,

Attorney for First Mortgage
Trustees,

15 Broad Street,

New York, N. Y.

MILBANK, TWEED & HOPE,

Of Counsel.

[Endorsed]: Filed Oct. 5, 1939. [1593]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter of

THE WESTERN PACIFIC RAILROAD
COMPANY REORGANIZATION.

ANSWER OF FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY (AS A COMMITTEE REPRESENTING INSTITUTIONAL HOLDERS OF FIRST MORTGAGE BONDS OF THE WESTERN PACIFIC RAILROAD COMPANY) TO THE PETITION OF THE WESTERN PACIFIC RAILROAD COMPANY DATED AUGUST 1, 1939.

Answering the Petition dated August 1, 1939, of The Western Pacific Railroad Company (hereinafter called the Debtor), Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company (hereinafter called the Committee) respectfully show:

First: The Committee is without knowledge of any negotiations between the parties to the proceeding herein for "an agreed upon Plan of Reorganization which might be [1594] acceptable to the Interstate Commerce Commission and susceptible of early consummation," after December 9, 1938, and prior

to June 9, 1939. On the latter date counsel for the A. C. James Co. and the Debtor asked the opinion of counsel for the Committee as to the basis upon which the Committee would consider agreement upon a compromise of the various questions affecting the reorganization of the Debtor then pending, undecided, before the Interstate Commerce Commission. Following that conference there was submitted by counsel for the A. C. James Co. to the Committee a proof of a Plan of Reorganization which did not comply with the conditions expressed in the opinion of the Committee's counsel at said conference of June 9, 1939. At a meeting of the Committee, attended also by counsel for the Committee, counsel for the A. C. James Co., counsel for the Debtor, and counsel for The Western Pacific Railroad Corporation, on June 30, 1939, the Committee failed to agree upon the proposals of the other parties and the other parties failed to agree upon proposals by the Committee.

Second: All said proposals were predicated upon the fact that numerous issues between the parties had not yet been decided by the Interstate Commerce Commission and that it was possible, as to each of the parties concerned, that such issues might be determined adversely. [1595]

Third: On July 24, 1939, counsel for the Debtor and counsel for The Western Pacific Railroad Corporation, advised counsel for the Committee that those corporations were prepared to accept the proposals made by the Committee on June 30, 1939.

Before any action by A. C. James Co. in the premises and before any reconsideration by the Committee whether it was prepared to renew the proposals rejected by the other parties on June 30, 1939, the Final Report and Order herein of the Interstate Commerce Commission, bearing a notation "Decided June 21, 1939," was made public on July 25, 1939. This decision determined most of the issues between the parties in favor of the position taken by the Committee and approved a Plan materially more favorable to the First Mortgage Bondholders than the proof of Plan annexed to said Petition dated August 1, 1939, of the Debtor, not only in the respects mentioned in said Petition but also in other and material respects. Thus in large part the basis for a compromise which had theretofore existed was removed upon the publication of said Final Report and Order.

Fourth: The Committee represents the holders of approximately 34.37% of the outstanding First Mortgage Bonds. While the Committee believes that prior to the determination by the Commission all of the holders of bonds which the Committee represents would have accepted the compromise which [1596] the Committee was then willing to recommend, and that a sufficient additional number of the holders of publicly held bonds would have followed such a recommendation to enable a compromise so recommended to be accepted by a sufficient number of the holders of First Mortgage Bonds to permit its confirmation under the provisions of Section 77 of the Bankruptcy Act, the

Committee does not believe that, in the present state of the record, it can fairly recommend such a compromise.

Fifth: Reorganization of the Debtor has already been unduly delayed and the Committee believes that no useful purpose would be served by reopening the record before the Commission upon which the Commission's Final Report and Order released July 25, 1939, was entered.

Wherefore, the Committee respectfully prays, (1) that said Petition of the Debtor, dated August 1, 1939, be denied, and (2) that the Commission promptly "certify the Plan to the Court, together with a transcript of the proceedings before it, and a copy of the Report and Order approving the Plan" in accordance with the provisions of subsection (d) of Section 77 of the Bankruptcy Act.

Respectfully submitted,

FREDERICK H. ECKER,
JOHN W. STEDMAN and
REEVE SCHLEY,

as a Committee representing institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company,

By CRAVATH, deGERSDORFF,
SWAINE & WOOD,

Counsel for the Committee,
15 Broad Street,
New York, N. Y.

Dated August 2, 1939. [1597]

State of New York,
County of New York—ss.

Littleton Groom, being duly sworn, deposes and says that he is Secretary of the Committee referred to in the foregoing Answer; that he has read the foregoing Answer and knows the contents thereof; that the same are true as stated except as to matters and things, if any, stated on information and belief, and that as to those matters and things he believes them to be true.

(Signed) LITTLETON GROOM.

Subscribed to in my presence and sworn to this
2nd day of August, 1939.

(Notarial Seal)

G. G. BERKELEY,

Notary Public, New York County; N. Y. Co. Clerk's
No. 594; Reg. No. 0B-770; Kings Co. Clerk's
No. 322, Reg. No. 599; Bronx Co. Clerk's No.
89, Reg. No. 243B40. Certificates filed also in
Richmond and Dutchess Counties.

Commission expires March 30, 1940.

[Endorsed]— Filed Oct. 5, 1939. [1598]

[Title of District Court and Cause.]

OBJECTIONS TO PLAN OF REORGANIZATION OF DEBTOR APPROVED BY INTERSTATE COMMERCE COMMISSION AND CLAIMS FOR EQUITABLE TREATMENT

To the Honorable the Judge of the United States District Court for the Northern District of California, Southern Division:

Now come Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing a group of institutional owners and holders of First Mortgage Bonds of The Western Pacific Railroad Company, Debtor herein (hereinafter [I634] referred to as the Committee), by its attorneys, Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark and Messrs. Cravath, de Gersdorff, Swaine & Wood, and pursuant to the order of this Court entered November 8, 1939, file these the Committee's objections to the Plan of Reorganization of the Debtor approved by the Interstate Commerce Commission June 21, 1939, and certified to this Honorable Court on or about September 28, 1939 (hereinafter referred to as the Commission Plan) and its claims for equitable treatment:

I.

Subparagraph 4 of paragraph P of the Commission Plan (pages 26-27 of mimeographed Report and Order) provides that there shall be allotted to The Railroad Credit Corporation, in addition to

35,425 shares of Common Stock of the Reorganized Company, \$154,111 of Income Mortgage 4-1/2% Bonds, Series A, and \$241,681 of 5% Preferred Stock, Series A, of the Reorganized Company.

Subparagraph 5 of paragraph P of the Commission Plan (page 27 of mimeographed Report and Order) provides that there shall be allotted to A. C. James Co., in addition to the 37,635 shares of Common Stock of the Reorganized Company, \$163,724 of Income Mortgage 4-1/2% Bonds, Series A, and \$256,756 of 5% Preferred Stock, Series A, of the Reorganized Company.

Accordingly, the notes of The Railroad Credit Corporation and of A. C. James Co., although secured by the Debtor's General and Refunding Mortgage Bonds, which Bonds are junior in lien to the Debtor's First Mortgage Bonds on substantially all of the property of the Debtor, are accorded *pro tanto* like treatment as that accorded [1635] the First Mortgage Bonds. In other words, the Commission necessarily found that the collateral pledged under the General and Refunding Mortgage had a value sufficiently great to justify the foregoing allocation of Income Mortgage Bonds and Preferred Stock to The Railroad Credit Corporation and A. C. James Co.

It appears from the face of the Report of the Commission on Further Consideration, decided June 21, 1939, which accompanies the Commission Plan (pages 9-13 of mimeographed Report and Order) that the allocation of said Income Mortgage Bonds

and Preferred Stock to said The Railroad Credit Corporation and said A. C. James Co. is based on a finding of the Commission that the securities of Tidewater Southern Railway Co. (a subsidiary of the Debtor), pledged under the General and Refunding Mortgage of the Debtor, have a value equal to their par value. It further appears from the face of the Report (pages 11-12 of the mimeographed Report and Order) that the Commission found that the lien of the General and Refunding Mortgage on the securities of the other companies, namely, the Central California Traction Company and the Alameda Belt Line, pledged under said Mortgage, has no material value.

The Commission found in its said Report (page 12 of mimeographed Report and Order) that the creditors secured by the General and Refunding Mortgage Bonds, that is, Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., should be awarded new Income Mortgage Bonds in the amount of \$732,010 and new Preferred Stock of a par value of \$1,147,955. The aggregate par value of such new securities is \$1,879,965. This is exactly the [1636] total of the Tidewater Southern securities pledged under the General and Refunding Mortgage (\$508,278 note and \$1,147,955, par value, capital stock) plus cash (\$223,732) in the hands of the Trustee under said General and Refunding Mortgage. It appears, therefore, that the creditors secured by the General and Refunding Mortgage Bonds have been awarded by

the Commission, in respect of the Tidewater Southern collateral, \$508,278 of the Reorganized Company's Income Mortgage 4-1/2% Bonds and \$1,147,955 of the Reorganized Company's 5% Preferred Stock.

Earnings required to pay interest on such Income Mortgage Bonds (\$22,872) and dividends on such new Preferred Stock (\$57,398) aggregate \$80,270. The Tidewater Southern's earnings available for payment of interest during the ten-year period 1929-1938 averaged \$75,436 a year. Against these earnings should be offset the Debtor's proportion of the deficits of the Central California Traction and the Alameda Belt Line. The Debtor's average yearly proportion of the Traction Company's deficits during the 1929-1939 period was \$31,920 per year, and its average yearly proportion of the Belt Line's deficit during the period was \$20,700 per year, making an average total deficit of \$52,600 per year which the Debtor had to make good by advances. Deducting such average losses from the Tidewater Southern's average earnings (\$75,436 minus \$52,600) gives average annual earnings of \$22,836 from the collateral pledged under the General and Refunding Mortgage. Such average earnings lack \$57,000 of being sufficient to cover the \$80,270 required to pay interest on the Income Mortgage Bonds and dividends on the Preferred Stock which the Commission [1637] found should be awarded to the creditors secured by the General and Refunding Mortgage Bonds. In only one year

since 1925 (the year 1935) would the earnings on the General and Refunding Mortgage collateral have been sufficient to pay such charges.

It further appears from the record that the note which is pledged under the General and Refunding Mortgage (in the face amount of \$508,278) represents an accumulation of advances made by the Debtor to the Tidewater Southern in each of the years 1927 to 1932, inclusive. It further appears from the record that in 1923 the Debtor paid an assessment of 30¢ per share on the 1,147,955 shares of Tidewater Southern stock owned by it, and in 1924 an assessment of 18¢ per share. Such assessments aggregated \$344,390 in 1923 and \$206,234 in 1924. It further appears from the record that no dividends have ever been paid on the Tidewater Southern stock since the acquisition thereof by the Debtor in 1917.

For the foregoing reasons, the Committee alleges that the Commission erred in its valuation of the securities pledged under the General and Refunding Mortgage, and in finding that the creditors secured by the Debtor's General and Refunding Mortgage Bonds should be awarded new Income Mortgage Bonds in the amount of \$732,010, and new Preferred Stock of a par value of \$1,147,955.

II.

Paragraph R of the Commission Plan (page 30 of mimeographed Report and Order) provides that the Plan shall be carried out under the supervision

of a reorganization committee consisting of three persons, one of whom shall be [1638] designated by the Bondholders Committee, one by Reconstruction Finance Corporation, and one by The Railroad Credit Corporation and A. C. James Co. jointly. This gives to the junior creditors (Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., the pledgees of the General and Refunding Mortgage Bonds), whose total claims aggregate \$12,704,000, two-thirds of the reorganization committee as against one-third to the holders of approximately \$62,000,000 of senior claims. The Committee alleges, therefore, that the Commission Plan is unfair to the First Mortgage Bondholders.

The Committee believes that, in order for the Plan to be fair and equitable, the reorganization committee should be composed of five persons, three to be designated by the holders of existing First Mortgage Bonds in such manner as the Court or the Commission may prescribe, one by Reconstruction Finance Corporation, and one by The Railroad Credit Corporation and A. C. James Co. jointly.

III.

The Committee reluctantly finds it necessary to file these objections to the Commission Plan. It has heretofore consistently manifested a willingness to make sacrifices in the interest of the reorganization. It has no desire or inclination to depart from that policy. The Committee states, therefore, that if the Commission Plan be approved by the Court

in its entirety, it is prepared to, and will, waive the foregoing objections. The Committee reserves all rights to object to any changes in the Commission Plan other than changes to correct the foregoing defects. [1639]

Wherefore, the Committee respectfully prays that the Commission Plan be approved as an entirety without change but that if any change therein is made that the defects in the Commission Plan in respect of which objections are herein taken be corrected by this Honorable Court and holders of First Mortgage Bonds of the Debtor be given equitable treatment:

(1) by allocating to The Railroad Credit Corporation and A. C. James Co., respectively, Income Mortgage Bonds and Preferred Stock of the Reorganized Company only in such amounts and proportions as a fair valuation of the collateral under the Debtor's General and Refunding Mortgage shows them to be entitled; and

(2) by modifying and correcting the provisions of the Commission Plan respecting the constitution of the reorganization committee to read as follows:

"The Plan shall be carried out under the supervision of a reorganization committee consisting of five persons, all to be approved by the Court, who shall be designated, three by holders of existing First Mortgage Bonds in such manner as the Court or the Commission may prescribe, one by Reconstruction Finance

Corporation, and one by The Railroad Credit Corporation and A. C. James Co. jointly. Should the holders of existing First Mortgage Bonds or Reconstruction Finance Corporation or The Railroad Credit Corporation and A. C. James Co., jointly, fail to designate a representative or representatives for membership on the committee within such time as the Court [1640] shall consider reasonable, the Court shall appoint such representative or representatives."

Dated New York, N. Y., December 6, 1939.

FREDERICK H. ECKER,
JOHN W. STEDMAN,
REEVE SCHLEY.

As a Committee representing a group of institutional owners and holders of First Mortgage Bonds of The Western Pacific Railroad Company,
by FREDERICK H. ECKER,

Chairman.

MORRISON, HOFFELD, FOERSTER,
SHUMAN & CLARK,

Crocker Building,

San Francisco, California.

CRAVATH, de GERSDOREFF,
SWAINE & WOOD,

15 Broad Street,

New York, N. Y.

Attorneys for Petitioners. [1641]

State of New York,
County of New York—ss.

Frederick H. Ecker, being duly sworn, deposes and says that he is one of the petitioners named in the foregoing petition; that he is Chairman of the Committee therein described; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

FREDERICK H. ECKER

Subscribed and sworn to before me this 6 day
of December, 1939.

[Seal]

EDWARD A. KEARNS

Notary Public Residing in Bronx County Clerk's
No. 44, Register's No. 59K40. Certificate filed
in New York County Clerk's No. 714, Regis-
ter's No. OK414 My Term Expires March 30,
1940

[Endorsed]: Filed Dec 8-1939. [1642]

[Title of District Court and Cause.]

MEMORANDUM STATEMENT SUBMITTED
BY RECONSTRUCTION FINANCE COR-
PORATION IN REGARD TO THE PLAN
OF REORGANIZATION CERTIFIED TO
THE COURT BY THE INTERSTATE
COMMERCE COMMISSION, WITH OB-
JECTION AND CLAIM FOR EQUITABLE
TREATMENT IN CASE THAT PLAN IS
NOT APPROVED.

On November 8, 1939, this Court entered an order requiring all parties in interest, having any objection to the plan of reorganization certified to the Court by the Interstate Commerce Commission to file with the Clerk of this Court their detailed and specific objections in writing to said plan and their claims, if any, for equitable treatment.

Reconstruction Finance Corporation (hereinafter called RFC) submits to the Court the following statement of its position with respect to that plan:

I.

RFC is the holder for value of \$10,000,000 principal amount of certificates of indebtedness issued by the Trustees herein. Upon the maturity of those [1643] certificates on December 1, 1939, the Trustees, pursuant to the prior authorizations of the Interstate Commerce Commission granted in its report and certificate of November 21, 1939, Finance Docket No. 12,213, and the approval of RFC, extended the maturity thereof until December 1,

1940. Interest on said Trustees' Certificates, as extended, is payable monthly at the rate of four per cent per annum. The Trustees herein have the privilege of redeeming all of said Trustees' Certificates, but not less than all, on any monthly interest payment date on thirty (30) days' previous notice, at the principal amount and accrued interest to the date fixed for redemption.

Under the applicable orders of this Court, said Trustees' Certificates rank equally and ratably as expenses of the administration by the Court of the property of the Debtor and, as such, constitute equally with other expenses of administration, a direct charge and lien on all property held by the Trustees of the Debtor as such.

II.

Subsections (d) and (e) of Section 77 of the Bankruptcy Act, as amended, it is respectfully submitted, require the liquidation in cash of all expenses of administration. Reference to these subsections clearly indicates that the term "creditors" as used throughout refers to creditors of the Debtor and not to creditors of the Trustees of the Debtor. Thus RFC's treatment in respect of the \$10,000,000 of Trustees' Certificates which it holds, is not governed by the clauses of the statute governing creditors of the Debtor. This is made even clearer by a provision in subsection (e) to the effect that the Court shall approve the plan (previously certified by the Interstate Commerce Commission) if satis-

fied, among other things, that "the plan provides for the payment of all costs of administration." In the instant case, the Certificates held by RFC by their terms are "expenses of administration" by the Court of the property of the Debtor; and under the terms of the statute, it would seem that the holder thereof, RFC, is entitled to insist that any plan effectuated herein provide for the payment thereof, along with other expenses of administration. [1644]

III.

RFC, however, has heretofore indicated (Petition dated December 9, 1938, for Modification of the Report and Order of the Interstate Commerce Commission of October 10, 1938) that it would not insist on said \$10,000,000 of Trustees' Certificates being paid in cash, if, in respect thereof and in respect of its claim against the Debtor, RFC should receive the treatment actually provided for in the plan certified by the Commission.

Prompt effectuation of a plan of reorganization of the Debtor is in the public interest, and in the interest of all classes of creditors of the Debtor, who since the institution of these proceedings more than four (4) years ago have received no interest on their claims, though there have been earnings available for the payment of interest. Since the position taken by RFC represents a concession on its part of rights which it is entitled to assert under the statute, it is hoped that other creditors in consideration thereof will be willing to make con-

responding concessions, in the common interest of all, so that the Debtor can be reorganized without further delay.

IV.

Apart from the above considerations, the Interstate Commerce Commission has approved the plan which it has certified to the Court, including the treatment provided therein for RFC, as meeting, in its opinion, the requirements of subsections (b) and (e) of said Section 77, and as being compatible with the public interest. In so doing, the Interstate Commerce Commission necessarily has had to consider legal questions not yet passed upon by this Court, such as the legal effect of mortgages and of other instruments evidencing creditors' rights. Otherwise it is necessary to impute to the Interstate Commerce Commission the adoption by it of an unrealistic conception of its function in these proceedings; for, if the Court disapproves the plan, the Court is required, by subsection (e) of Section 77, either to dismiss the proceedings or to refer the plan back to the Commission for further action.

The treatment proposed for RFC in the plan certified by the Interstate [1645] Commerce Commission is fully justified on the basis, alone, of RFC's taking in exchange for the \$10,000,000 of Trustees' Certificates which it holds an equivalent amount of the new fixed interest bonds provided for in that plan, in lieu of payment in cash of said Trustees' Certificates. No assurance has been af-

forded at any time by any party herein that the \$10,000,000 of said new fixed interest bonds can be sold at par, as required in the plan certified by the Interstate Commerce Commission, through private channels. In compensation of the RFC's taking, instead of cash, new fixed interest bonds, for its \$10,000,000 of Trustees' Certificates, the plan certified by the Commission allows the RFC MORE new income mortgage bonds and new participating preferred stock, and LESS new common stock than would be allowed to it solely on the basis of the general mortgage bonds pledged with it. This provision is fully warranted in view of the fact that if the plan is effectuated RFC will hold, in lieu of \$10,000,000 of short-term Trustees' Certificates which are obligations of the Court's Trustees, \$10,000,000 of 35-year bonds which will be obligations of a reorganized company and a much less valuable security.

V.

Should the plan certified by the Interstate Commerce Commission not be approved, RFC urges the following detailed and specific objection to any plan which provides for RFC different and less favorable treatment than is provided for RFC in that plan.

The plan approved by the Commission allocates to the holders of the General Mortgage Bonds of the Debtor a total of \$732,010 of new income mortgage bonds and \$1,147,955 of new participating pre-

ferred stock, in recognition of the admittedly prior lien of the General and Refunding Mortgage upon \$223,732 of cash in the hands of the Mortgage Trustee and upon a note of Tidewater Southern Railroad Company for \$508,278 and \$1,147,955 par value of capital stock of Tidewater Southern Railroad Company pledged under a General and Refunding Mortgage. Additional new income mortgage bonds and ~~new~~ participating preferred stock are provided in that plan for RFC, in respect of RFC's collateral other than the [1646] General Mortgage Bonds, and in consideration of RFC's accepting, in exchange for the \$10,000,000 of Trustees' Certificates which it holds, in lieu of cash payment therefor, the \$10,000,000 of new fixed interest bonds provided for in said plan. Should the Court find that there has been error in the construction placed by the Interstate Commerce Commission upon certain provisions of the First Mortgage of the Debtor and the effects which were assumed to follow, necessitating the disapproval of that plan by the Court, then RFC objects to any plan which does not provide for the payment in cash of the \$10,000,000 of Trustees' Certificates which RFC holds, and the full recognition, in the new securities allocated to RFC, not only of the collateral pledged with RFC other than General Mortgage Bonds, but also, of ~~the share of the new securities~~ which are allocated to the General Mortgage Bonds to which RFC is entitled by reason

of RFC's first lien on \$10,750,000 of General Mortgage Bonds and its second lien on an additional \$2,000,000 of General Mortgage Bonds, out of the total \$18,999,500 of General Mortgage Bonds issued and outstanding.

VI.

In case the plan certified by the Interstate Commerce Commission is not approved, RFC urges the following claim for equitable treatment:

(a) The \$10,000,000 of Trustees' Certificates which RFC now holds should be paid in cash with accrued interest.

(b) Full recognition, in the new securities allocated to RFC should be had, not only of the collateral pledged with RFC other than General Mortgage Bonds, but also, of the share of the new securities which are allocated to the General Mortgage Bonds to which RFC is entitled by reason of RFC's first lien on \$10,750,000 of General Mortgage Bonds and its second lien on an additional \$2,000,000 of General Mortgage Bonds, out of the total \$18,999,500 of General Mortgage Bonds issued and outstanding.

Wherefore, RFC prays that the plan of reorganization certified by the Interstate Commerce Commission be approved, and, if that plan be not so approved, that no plan be approved that does not give due effect to RFC's [1647] objection and its claim for equitable treatment, herein stated.

Dated at Washington, D. C., the 5th day of December, 1939.

**RECONSTRUCTION
FINANCE CORPORATION,**

By **CLAUDE E. HAMILTON, JR.**

General Counsel and an Officer
of said Corporation.

Of Counsel:

CASSIUS M. CLAY,

Assistant General Counsel.

FLORENCE DE HAAS DEMBITZ,

Attorney,

Reconstruction Finance Corporation,

BROBECK, PHLEGER & HARRISON,

Crocker Building,

San Francisco, California. [1648]

District of Columbia,

City of Washington—ss.

Claude E. Hamilton, Jr., being duly sworn, deposes and says:

That he is General Counsel and an officer of Reconstruction Finance Corporation, the petitioner herein, which is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and that the same is true except as to those matters

stated to be on information and belief, and that as to those matters he believes it to be true.

CLAUDE E. HAMILTON, JR.

Sworn to before me this 5th day of December, 1939.

NANCY H. KOUNDOUREAT,

Notary Public.

My Commission expires Feb. 14, 1943.

[Endorsed]: Filed Dec. 7, 1939. [1649]

[Title of District Court and Cause.]

DESIGNATION BY APPELLEES, FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, AS A COMMITTEE FOR A GROUP OF INSTITUTIONAL HOLDERS OF FIRST MORTGAGE BONDS OF THE WESTERN PACIFIC RAILROAD COMPANY, AND CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE FIRST MORTGAGE DATED JUNE 26, 1916, OF THE WESTERN PACIFIC RAILROAD COMPANY, OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL.

Pursuant to the provisions of Rule 75(a) of the Federal Rules of Civil Procedure and of Rule

19(6). of the Circuit Court of Appeals for the Ninth Circuit, Frederick H. Ecker, John W. Stedman and Reeve Schley (hereinafter referred to as the Institutional Committee), as a Committee for a Group of institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company (hereinafter referred to as the Debtor), and Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage dated June 26, 1916, of the Debtor (hereinafter referred to as the First Mortgage Trustees), appellees in connection with the appeals taken by the Debtor, The Western Pacific Railroad Corporation, A. C. James Co., a corporation, The Railroad Credit Corporation and Irving Trust Company, as Trustee under the General and [1650] Refunding Mortgage dated January 1, 1932, of the Debtor, pursuant to notices filed September 20, 1940 (hereinafter together referred to as the appellants), hereby designate the following portions of the record, proceedings and evidence to be included in the record on appeal to the Circuit Court of Appeals for the Ninth Circuit in addition to the portions of such record, proceedings and evidence heretofore on October 10, 1940, designated by the appellants:

1. The verified statement of Crocker First National Bank of San Francisco, as Corporate Trustee under the Debtor's First Mortgage, filed herein on September 4, 1935, and showing the principal amount of First Mortgage Bonds outstanding under said First Mortgage.

2. Opinion and Order entered November 9, 1935, of the District Court confirming appointment of Trustees of the Debtor.

3. Petition of the First Mortgage Trustees for an order impounding income, for leave to intervene, and other relief, filed March 5, 1936, and Order to Show Cause, dated March 5, 1936, fixing time and place of hearing on said Petition.

4. Order entered March 9, 1936, permitting First Mortgage Trustees to intervene and making provision as to rights of said Trustees with respect to income of the Debtor.

5. Petition dated June 25, 1936, of the Institutional Committee for leave to intervene in proceedings before the Interstate Commerce Commission and filed on or about June 26, 1936.

6. Order of Interstate Commerce Commission [183] entered July 9, 1936, permitting intervention of Institutional Committee in proceedings before said Commission.

7. Petition dated October 23, 1936, of the First Mortgage Trustees for leave to intervene before the Interstate Commerce Commission and filed on October 26, 1936.

8. The exceptions to the proposed report dated August 2, 1937, of the Bureau of Finance of the Interstate Commerce Commission, filed on behalf of the Institutional Committee and on behalf of the First Mortgage Trustees, if such exceptions are not already included in designation No. (24) of the appellants, filed herein on October 10, 1940.

9. Replies of the several parties to the exceptions of the parties to the proposed report of the Bureau of Finance of the Interstate Commerce Commission dated August 2, 1937.

10. Petitions of the Institutional Committee, Reconstruction Finance Corporation and The Railroad Credit Corporation for modification of Report and Order dated October 10, 1938, of the Interstate Commerce Commission, and filed with said Commission on December 9, 1938, if not already included in designation No. (25) of the appellants, filed herein on October 10, 1940.

11. Reply of First Mortgage Trustees to the petitions of the several parties for modification of the Interstate Commerce Commission's Report and Order dated October 10, 1938, such Reply having been filed with the Interstate Commerce Commission on or about December 17, 1938.

12. Answer dated August 2, 1939, of the Institutional Committee to the Petition, dated August 1, 1939, of [1652] the Debtor for rehearing and modification of the Report and Order, dated June 21, 1939, of the Interstate Commerce Commission.

13. Petition of the Institutional Committee for leave to file petition of intervention and order granting such petition, both filed November 22, 1939; petition of intervention, verified November 16, 1939, of the Institutional Committee and notice of filing of same dated November 22, 1939, both filed November 22, 1939; order granting Institutional Committee's petition of intervention entered Novem-

ber 27, 1939, and notice of making and entry of said order dated November 28, 1939.

14. Petition for leave to file petition of intervention of Reconstruction Finance Corporation and Order granting such petition and fixing date of hearing on petition of intervention, both filed December 7, 1939, petition of intervention of Reconstruction Finance Corporation and notice of filing of same, both dated December 7, 1939, and order granting petition of intervention dated December 11, 1939, and notice of making and entry of said order.

15. Objections to Plan of Reorganization of the Debtor Approved by the Interstate Commerce Commission and Claims for Equitable Treatment of the Institutional Committee dated December 6, 1939, and filed December 8, 1939.

16. Memorandum statement submitted by Reconstruction Finance Corporation in regard to Plan of Reorganization certified to the Court by the Interstate Commerce Commission, with objections and claims for equitable treatment in case that Plan should not be approved, dated December 5, 1939, and filed December 8, 1939: [1653]

17. Monthly income statements of the Debtor filed with the Interstate Commerce Commission and made a part of the record in the proceedings before said Commission Finance Docket 10,913, pursuant to stipulation of the parties, which record has heretofore been certified to and filed in the above-named Court.

18. Copy of this additional designation.

Dated, October 17, 1940.

MORRISON, HOHFELD,
FOERSTER, SHUMAN &
CLARK,

By HERBERT W. CLARK,
CRAVATH, DE GERSDORFF,
SWAINE & WOOD,

By ROBERT T. SWAINE,
Attorneys for Appellees Frederick
H. Ecker, John W. Stedman and
Reeve Schley, as an Institutional
Committee as aforesaid.

CHICKERING & GREGORY,
By DONALD M. GREGORY,
MILBANK, TWEED & HOPE,
By ORVILLE W. WOOD,

Attorneys for Appellees Crocker
First National Bank of San Fran-
cisco and Samuel Armstrong, as
Trustees under Debtor's First Mort-
gage.

(Affidavit of service.)

[Endorsed]: Filed Oct. 21, 1940. [1654]

[Title of District Court and Cause.]

PETITION RESPECTING THE SALE OR DISPOSITION OF COLLATERAL BY RECONSTRUCTION FINANCE CORPORATION, THE RAILROAD CREDIT CORPORATION AND A. C. JAMES CO. [1655]

To the Honorable the Judges of the District Court of the United States for the Northern District of California, Southern Division.

Now comes The Western Pacific Railroad Company, debtor in the above proceeding, and respectfully represents to the Court:

First: That Reconstruction Finance Corporation is a corporation created by Act of Congress approved January 22, 1932, and certain Acts supplementary thereto and amendatory thereof; that The Railroad Credit Corporation is a corporation organized and doing business under and by virtue of the laws of the State of Delaware; and that A. C. James Co. is a corporation organized and doing business under and by virtue of the laws of the State of Delaware.

Second: That under authority of the Interstate Commerce Commission the debtor from time to time borrowed sums of money from Reconstruction Finance Corporation, the amount whereof as of June 30, 1935, after crediting certain amounts repaid thereon, is \$2,963,000. That these loans are evidenced by promissory notes a copy of one of

which is hereto annexed and made a part hereof and marked Exhibit "A." [1656]

Third: That the debtor from time to time has borrowed from The Railroad Credit Corporation sums of money, the amount whereof as of June 30, 1935, after crediting certain amounts repaid thereon, is \$2,538,956. That these loans are evidenced by promissory notes, a copy of one of which is hereto annexed and made a part hereof and marked Exhibit "B."

Fourth: That the debtor from time to time has borrowed from A. C. James Co. sums of money which as of June 30, 1935, amount to \$4,999,800. These loans are evidenced by promissory notes, a copy of one of which is hereto annexed and made a part hereof and marked Exhibit "C."

Fifth: All of the said notes are secured by the deposit and pledge, in varying amounts, of General and Refunding Mortgage Bonds of the debtor dated January 1, 1932. The aggregate amount of General and Refunding Bonds pledged under said notes is \$18,999,500, or a sum amounting to more than 180% of the face amount of the notes held by the above named corporations as of June 30, 1935. In addition to the General and Refunding Mortgage Bonds so pledged there are pledged under certain of said notes other collateral having a substantial value, the exact amount of which the debtor is unable to estimate at the present time and under prevailing market conditions.

Sixth: Each of said notes held by Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co. contains provisions that upon non-performance of any of the covenants or agreements made with the payee, or upon the non-payment of the liabilities contained in such notes, or upon default in payment of interest thereon, or in case of the insolvency of the debtor, or the appointment of a receiver of the debtor or of its property, or in case of an assignment for the benefit of creditors, the payee may sell, assign, transfer and deliver any of the said collateral security, either at any broker's board or at public or private sale, and for cash, or upon credit, or for future delivery, without demand, advertisement, or notice of the time or place of sale.

[1657]

Seventh: That by reason of the fact that the said notes of the debtor are held by corporations, the debtor believes that there is danger that certain of the noteholders may claim that one or more of the events entitling them to sell said collateral have occurred, and may proceed to exercise their rights of sale under said collateral notes, which action the debtor fears would precipitate similar action by other holders of pledged collateral.

Eighth: That sale of such collateral, including, as it does, an amount of General and Refunding Mortgage Bonds of the debtor, largely in excess of the amount of indebtedness secured thereby, would greatly increase the debt of the corporation

and would cause a substantial and irreparable loss to the trust estate, and would impede, if not render abortive, the plan of reorganization which the debtor proposes forthwith to submit to the Interstate Commerce Commission, and the sale of such collateral during the progress of the reorganization proceeding would require such changes in detail from time to time as to force an abandonment of the proceedings. For this reason the debtor submits that the maintenance of the status quo for a reasonable length of time is necessary to enable the debtor to perfect a reorganization under the plan which it is to submit to the said Commission.

Ninth: That the debtor has no adequate remedy at law and accordingly files this petition in this Court pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, whereunder this Court, having approved the debtor's petition, has during the pendency of these proceedings exclusive jurisdiction of the debtor and its property, wherever located.

Tenth: Wherefore, the debtor asks that this Court include in its Order approving the petition filed herein under the aforesaid Section 77, a provision that all persons and corporations holding collateral heretofore pledged by the debtor as security for its [1658] notes and obligations, be and each of them is restrained and enjoined from selling, converting, or otherwise disposing of, such col-

lateral or any part thereof until further Order of this Court.

THE WESTERN PACIFIC
RAILROAD COMPANY,

Debtor.

By CHARLES ELSEY,

President.

WARREN OLNEY, JR.,

Balfour Building, San Francisco, California.

PIERCE & GREER,

15 Broad Street, New York City, New York,

Attorneys for Debtor. [1659]

State of California,

City and County of San Francisco—ss.

Charles Elsey, being duly sworn, deposes and says: That he is an officer, to-wit, President, of The Western Pacific Railroad Company, a railroad corporation, the petitioning debtor mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true; also that the said petition is filed in good faith.

CHARLES ELSEY.

Subscribed and sworn to before me this 2nd-day of August, 1935.

[Seal]

FLORA HALL, Notary Public.
in and for the City and County of
San Francisco, State of California.

[1660]

(EXHIBIT "A")

NOTE

New York; New York,
August 1, 1932.

\$136,045.00

On or before Aug. 1, 1935, The Western Pacific Railroad Company, a corporation of the State of California (hereinafter called the "Railroad Company"), for value received, promises to pay to the Reconstruction Finance Corporation (hereinafter called the "payee"), or order, at the Federal Reserve Bank of New York, in New York, New York, in gold coin of the United States of America of the present standard of weight and fineness, One Hundred Thirty-six Thousand and Forty-five Dollars, with interest at the rate of six per cent. (6%) per annum from the date hereof, payable quarterly on the first day of November, February, May, and August in each calendar year and until payment of said principal sum, with the option on the part of the said Railroad Company to repay the whole or any part of said principal sum, with accrued interest thereon, at any time before maturity; having deposited with the said payee as collateral security for the payment

of this note or any extension or renewal thereof, or for the payment of any other liability or liabilities of the Railroad Company to the said payee due or to become due, or which may hereafter be contracted or existing, including, among said liabilities, note of the Railroad Company for \$799,000, maturing on before March 1, 1935, and the note of the Railroad Company for \$734,584, maturing on or before June 29, 1935; both payable to Reconstruction Finance Corporation, or order, the following described property, which shall be applied *pari passu* and without preference to all of said notes and liability or liabilities:

\$8,750,000 principal amount of The Western Pacific Railroad Company's General and Refunding Mortgage, Series "A" 5% Bonds of 1957;

100,000 principal amount of Tidewater Southern Railway Company's First Mortgage 5% 30-year Sinking Fund Bonds, due 1942;

All of the right, title, and interest of The Western Pacific Railroad Corporation in 150,000 shares of the Common Capital Stock of The Denver & Rio Grande Western Railroad Company represented by stock trust certificates, subject, among other things, to all covenants and agreements made in a certain agreement dated June 15, 1923, between The Western Pacific Railroad Corporation and the Missouri Pacific Railroad Company.

The Railroad Company hereby agrees, on demand of the payee, to deposit with the payee such additional security as it may from time to time demand, and further agrees that the securities hereby pledged, together with any that may be pledged hereafter or may have been pledged heretofore as security for this or any other obligation of the Railroad Company to the payee, shall be applicable in like manner to secure the payment of any and all such obligations. And all such securities in the hands of the payee shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one may be made good by enforcement of the rights and remedies of the payee in respect of the sale of collateral or otherwise as to the rest. And the Railroad Company hereby gives to the payee a lien for the amount of all the liabilities aforesaid upon all other property of the Railroad Company at any time coming into the possession of the payee. And the Railroad Company hereby agrees to remain responsible for any deficiency in payment, waiving any benefit, exemption, or privilege under any law now or hereafter to be in force.

The Railroad Company further agrees that on the nonperformance of the foregoing agreement to furnish additional security upon demand of the payee and/or upon nonperformance of any of the covenants or agreements made with and on file with the Interstate Commerce Commission or the Reconstruction Finance Corporation and/or the payee, as

hereinafter defined, or upon the nonpayment of any of the abovementioned liabilities, or upon default in payment of interest on any of the said liabilities as the same may become due, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, or assignment for the benefit of creditors, then in any such case the payee is hereby authorized to sell, assign, transfer, and deliver any or all of said securities or interest therein or any substitute therefor, or any additions thereto, or any such other property, at such time or times to such person or persons, and in such several parts or parcels as the payee may decide, and to sell the whole or any of such parts or parcels or interest therein, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without demand, advertisement, or notice of the time or place of sale or adjournments thereof which are hereby expressly waived. Upon the nonpayment or the nonfulfillment of any of the conditions of this note, or upon any sale of any of the collateral security held by the payee or upon the appointment of a receiver of the Railroad or of its property or upon an assignment for the benefit of creditors as aforesaid, then the whole or any designated part of the liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof for payment.

In case of any sale by the payee in pursuance of the terms of the last preceding paragraph of any or

all of said securities or interest therein or other property on credit or for future delivery, such securities or such interest therein or such other property shall remain vested in and shall be retained by the payee until the sale price therefor be paid by the purchaser, but the payee shall incur no liability in case of failure by the purchaser to take up and pay for such securities or such interest or such other property so sold. In case of any such failure the payee shall have the same right to dispose of said securities and interest therein and such other property as are given in the last preceding paragraph to the same effect as though no sale had theretofore been made.

At any sale under the provisions of this instrument, the payee may itself purchase the whole or any part of the securities sold or interest therein or other property, free from all right of redemption on the part of the Railroad Company, which right is hereby waived and released. In case of any sale the payee may first deduct all expenses incident to the collection, sale, and delivery of the securities or property so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any deficiency remaining or existing after such sale. And the Railroad Company hereby further authorizes the payee, at its option, at any time, to appropriate and apply

to the payment of any of the aforesaid liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the aforesaid liabilities are then due or not due.

The Railroad Company further agrees that, upon any transfer of this note, the payee may deliver the securities or property held as security, or any part thereof, or interest therein, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in respect thereto for the purpose of securing and enforcing the payment to the holder of the whole or any part of the indebtedness evidenced by this note. And the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter to the Railroad Company or to its successors or assigns.

The Railroad Company and indorsers and guarantors hereby waive presentment, protest, and notice of dishonor, and agree to remain bound for the payment of this note and all interest and charges thereon, and that the lien hereof and the pledge hereunder shall remain undisturbed, notwithstanding any extension of time, substitution of collateral, or other indulgence granted by the holder of this note, hereby waiving all notice of such extension, substitution, or other indulgence.

In the event this note, or any part thereof, is collected by an attorney, either with or without suit,

the Railroad Company agrees to pay a reasonable attorney's fee and cost of collection.

The term payee shall mean and include the Reconstruction Finance Corporation and/or any successor, or assign, or liquidator, or transferee of the Reconstruction Finance Corporation or any other transferee of this note.

In Witness Whereof, The Railroad Company has caused this note to be executed by its president or vice-president and its corporate seal to be hereunto affixed by its secretary or assistant secretary, this 1st day of August, 1932.

(Seal)

THE WESTERN PACIFIC
RAILROAD COMPANY,

By M. J. CURRY,

Vice-President.

Attest:

(Signed) THOMAS J. BYRNE,
Assistant Secretary. [1661]

EXHIBIT "B"

NOTE OF BORROWING CARRIER

New York, N. Y.,

June 29, 1932.

\$1,303,000.

On demand, but if no demand is made, then on or before February 28, 1934, The Western Pacific Rail-

road Company, a corporation of the State of California (hereinafter called the "Railroad Company"), for value received, promises to pay to The Railroad Credit Corporation (hereinafter called the "payee"), or order, at its office in Washington, D. C., in gold coin of the United States of America of the present standard of weight and fineness, One Million Three Hundred Three Thousand Dollars, with interest thereon payable semi-annually at the rate of $2\frac{1}{2}$ per cent per annum from the date hereof, to and including the 30th day of June, 1932, and thereafter at rates to be fixed as provided in the Marshalling and Distributing Plan, 1931, and until payment of said principal sum, with the option on the part of the Railroad Company to repay the whole or any part of said principal sum, with accrued interest thereon, at any time before maturity; having deposited with the payee as collateral security for the payment of this note and any extension or renewal thereof, as well as for the payment of any other liability or liabilities of the Railroad Company to the payee due or to become due, or which may hereafter be contracted or existing, the following described property: [1662]

In addition thereto the Railroad Company agrees subject to the approval of the Interstate Commerce Commission when required by law, to pledge and does hereby pledge with the payee, the Railroad Company's distributive share in the fund established under the aforesaid Plan, as the same may

at any time and from time to time determined, and also all right, title and interest of the Railroad Company in and to any and all securities now or hereafter deposited as collateral security for any loan or loans from the Reconstruction Finance Corporation to the Railroad Company, subject always to the lien thereon of said Reconstruction Finance Corporation.

The Railroad Company hereby agrees, on demand of the payee, to deposit with the payee such additional security as the payee may from time to time demand, and further agrees that the securities hereby pledged, together with any that may be pledged hereafter or may have been pledged heretofore as security for this or any other obligation of the Railroad Company to the payee, shall be applicable in like manner to secure the payment of any and all such obligations. And all such securities in the hands of the payee shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one may be made good by enforcement of the rights and remedies of the payee in respect of the sale of collateral or otherwise as to the rest. And the Railroad Company hereby gives to the payee a lien for the amount of all the liabilities aforesaid upon all other property of the Railroad Company at any time coming into the possession of the payee. And the Railroad Company hereby agrees to remain responsible for any deficiency in payment, waiving any benefit,

exemption, or privilege under any law now or hereafter to be in force.

The Railroad Company further agrees that on the nonperformance of the foregoing agreement to furnish additional security upon demand of the payee and/or upon nonperformance of any of the covenants or agreements made with the payee, as hereinafter defined, or upon the nonpayment of any of the above mentioned liabilities, or upon default in payment of interest on any of the said liabilities as the same may become due, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, or assignment for the benefit of creditors, then in any such case the payee is hereby authorized to sell, assign, transfer, and deliver any or all of said securities or interest therein or any substitute therefor, or any additions thereto; or any such other property, at such time or times, to such person or persons, and in such several parts or parcels as the payee may decide, and to sell the whole or any of such parts or parcels or interest therein, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without demand, advertisement, or notice of the time or place of sale or adjournments thereof which are hereby expressly waived. Upon the nonpayment or the nonfulfillment of any of the conditions of this note, or upon any sale of any of the collateral security held by the payee or upon the appointment of a receiver of the Railroad Company or of its

property or upon an assignment for the benefit of creditors as aforesaid, then the whole or any designated part of the liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof for payment.

In case of any sale by the payee in pursuance of the terms of the last preceding paragraph of any or all of said securities or interest therein or other property on credit or for future delivery, the payee shall incur no liability in case of failure by the purchaser to take up and pay for such securities or such interest or such other property so sold. In case of any such failure the payee shall have the same right to dispose of said securities and interest therein and such other property as are given in the last preceding paragraph to the same effect as though no sale had theretofore been made.

At any sale under the provisions of this instrument, the payee may itself purchase the whole or any part of the securities sold or interest therein or other property, free from all right of redemption on the part of the Railroad Company, which right is hereby waived and released. In case of any sale the payee may first deduct all expenses incident to the collection, sale, and delivery of the securities or property so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any

deficiency remaining or existing after such sale. And the Railroad Company hereby further authorizes the payee, at its option, at any time, to appropriate and apply to the payment of any of the aforesaid liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the aforesaid liabilities are then due or not due.

The Railroad Company further agrees that, upon any transfer of this note, the payee may deliver the securities or property held as security, or any part thereof, or interest therein, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in respect thereto for the purpose of securing and enforcing the payment to the holder of the whole or any part of the indebtedness evidenced by this note. And the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter of the Railroad Company or to its successors or assigns.

The Railroad Company and indorsers and guarantors hereby waive presentment, protest, and notice of dishonor, and agree to remain bound for the payment of this note and all interest and charges thereon, and that the lien hereof and the pledge hereunder shall remain undisturbed, notwithstanding any extension of time, substitution of collateral, or other indulgence granted by the holder of this

note, hereby waiving all notice of such extension, substitution, or other indulgence.

In the event this note, or any part thereof, is collected by an attorney, either with or without suit, the Railroad Company agrees to pay a reasonable attorney's fee and cost of collection.

The term payee shall mean and include The Railroad Credit Corporation and/or any successor, or assign, or liquidator, or transferee of The Railroad Credit Corporation or any other transferee of this note.

Until this note and interest thereon have been fully paid, the Railroad Company agrees not to pay any dividend on any of its capital stock (except on stock, if any, on which non-payment of a specific dividend constitutes a default).

In witness whereof the Railroad Company has caused this note to be executed by its Vice-President and attested or countersigned by its Assistant Secretary, both being thereunto duly authorized, this 29th day of June, 1932.

THE WESTERN PACIFIC
RAILROAD COMPANY,

By M. J. CURRY,

Vice-President.

Countersigned by:

.....
Title

Attest:

T. J. BYRNE,

Assistant Secretary. [1663]

EXHIBIT "C"

March 28, 1932.

\$347,000.

Three years after date, The Western Pacific Railroad Company, a corporation of the State of California, (hereinafter called the "Railroad Company") for value received, promises to pay to the A. C. James Co., a Delaware corporation (hereinafter called the "payee") or order, at the office of the payee at No. 40 Wall Street, in the City of New York; in gold coin of the United States of America of the present standard of weight and fineness, Three Hundred Forty-seven Thousand Dollars (\$347,000); with interest at the rate of Five per cent (5%) per annum from the date hereof, payable quarterly on the first day of April, July, October and January in each year and until payment of said principal sum; having deposited with said payee as collateral security for the payment of this or any other liability or liabilities of the Railroad Company to the payee due or to become due, or which may hereafter be contracted or existing, the following described property:

\$433,500. principal amount of the Railroad Company's General and Refunding Mortgage Gold Bonds, Series A.

The Railroad Company hereby agrees to deposit with the payee such additional security as the payee may from time to time demand, and also hereby gives to the payee a lien for the amount of all the

liabilities aforesaid upon all property of the Railroad Company at any time coming into the possession of the payee.

On the nonperformance of the foregoing agreement as to, furnishing additional security, or upon the nonperformance of any of the covenants or agreements of the Railroad Company in its First Mortgage of June 26, 1916, its General and Refunding Mortgage of January 1, 1932, or in an obligation dated March 1, 1932 made by the Railroad Company with and on file with the Reconstruction Finance Corporation, or upon the nonpayment of any of the above mentioned liabilities, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, then in any such case the payee is hereby authorized to sell, assign and deliver, the said property or any substitute therefor, or any additions thereto, or any such other property, at such time or times and in such several parts or parcels as the payee may decide, and to sell the whole or any said parts or parcels, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without advertisement, or notice, which are hereby expressly waived. Upon the non-payment or the nonfulfillment of any of the conditions of this note, then the whole or any designated part of the liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof.

for [1664] payment. In case of any sale by the payee of any of said property on credit or for future delivery, the property sold shall be retained by the payee until the selling price is paid by the purchaser, but the payee shall incur no liability in case of failure of the purchaser to take up and pay for the property so sold.

In case of any such failure the property may be again sold. At any sale hereunder the payee may itself purchase the whole or any part of the property sold, free from all right of redemption on the part of the Railroad Company, which is hereby waived and released. In case of any sale the payee may first deduct all the expenses of collection, sale, and delivery of the property so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any deficiency arising upon any such sale. The Railroad Company does hereby further authorize the payee at its option at any time to appropriate and apply to the payment of any of said liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the said liabilities are then due or not due. The Railroad Company further agrees that, upon any transfer of this note, the payee may

deliver the property held as security, or any part thereof, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in respect thereto, and the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter.

The term "payee" shall mean and include the A. C. James Co. and/or any successor or assign or liquidator or transferee of said A. C. James Co. or any other transferee of this note.

THE WESTERN PACIFIC
RAILROAD COMPANY,

By M. J. CURRY,


(Corp. Seal)

Vice-President.

Attest:

T. J. BYRNE,

Assistant Secretary. [1665]



1800

A. C. James Co. et al. vs.

The Western Pacific Railroad Company

	Present Annual Salary
T. M. Schumacher.....Chairman of the Executive Committee.....	\$15,000.00
Charles Elsey.....President.....	25,000.00
E. W. Mason.....Vice President and General Manager.....	13,608.00
J. F. Hogan.....Vice President in Charge of Traffic.....	12,960.00
J. W. Williams.....Chief Engineer.....	10,692.00

Salary of President December 31, 1931, \$45,000 per annum.

United States District Court

No. 26591

Re The Western Pac. R. R. Co., Debtor.

Exhibit on Hearing on Original Petitions. Filed
8/2/35.

WALTER B. MALING,

Clerk,

By (signed) **LYLE S. MORRIS,**

Deputy Clerk.

[Endorsed]: Filed in Open Court August 2,
1935, at 2 o'clock and 30 minutes P. M. Walter B.
Maling, Clerk, By (signed) Lyle S. Morris, Deputy
Clerk. [1666]

[Title of District Court and Cause.]

PETITION OF REORGANIZATION TRUSTEES FOR SUPPLEMENTAL ORDER AUTHORIZING THEM TO BORROW \$10,000,000 FROM RECONSTRUCTION FINANCE CORPORATION AND TO EVIDENCE AND SECURE SAID LOAN BY THE ISSUANCE OF THEIR CERTIFICATES OF INDEBTEDNESS.

T. M. Schumacher and Sidney M. Ehrman, the duly appointed and qualified Trustees of the properties of the debtor above named, hereby represent to the court and petition as follows:

I.

On October 5, 1938, upon hearing after due notice and with the approval of the Interstate Commerce Commission in accordance with Section 20a of the Interstate Commerce Act, [1711] this court made its order (1) finding (a) that your petitioners had theretofore issued and there were then outstanding their certificates of indebtedness in the principal amount of \$10,000,000, maturing and payable on December 1, 1938, (b) that said certificates represented an indebtedness all of which was authorized and incurred for the purpose of meeting the cost of doing certain work upon and acquiring certain equipment for the railroad of the debtor which it was necessary should be done and acquired in order that said railroad might be operated with safety and reasonable efficiency, that its physical

elements might be conserved and its existing business retained and that it might furnish to the public service in the way of transportation of persons and property adequately responsive to the reasonable requirements and demands of the public upon said railroad for such service, (c) that it was necessary that your petitioners provide themselves with funds for payment of said certificates at their maturity in order to insure against a default upon them and (d) that the only means your petitioners had for securing the necessary funds with which to meet the principal of said certificates when it falls due was the issuance by them of new certificates of indebtedness in the amount of such principal, and (2) authorizing and empowering your petitioners, for the purpose of paying at maturity their said certificates of indebtedness then outstanding, to issue and to sell their certificates of indebtedness in the aggregate principal amount of \$10,000,000 and prescribing the terms of such certificates and the conditions of their sale. The necessity for your petitioners to provide themselves with funds for payment of said outstanding certificates at their maturity in order to insure against a default upon them and to issue for said purpose new certificates of indebtedness in the [1712] amount of the principal of said outstanding certificates, as found by said order, continues to exist. Your petitioners have made inquiries and conducted negotiations looking to the issuance and sale of the certificates so authorized but have not

yet been able to sell the same upon satisfactory terms or to arrange to do so. Your petitioners believe, however, that they can obtain a loan from the Reconstruction Finance Corporation in the said sum of \$10,000,000, such loan to be evidenced and secured by the issuance to said Reconstruction Finance Corporation of the certificates of indebtedness of your petitioners in that aggregate amount maturing either December 1, 1939, or December 1, 1940, and bearing interest at the rate of 4 per cent per annum. It is in the interest of their trust estate that your petitioners be authorized to borrow said sum from Reconstruction Finance Corporation in order to insure that your petitioners have the necessary funds with which to meet the principal of said outstanding certificates when it falls due, in case they are unable shortly to sell, upon more favorable terms, their certificates as already authorized. If such loan is made, the terms of the certificates of indebtedness to be issued to evidence and secure the same should be the same as those authorized or prescribed by said order of October 5, 1938. To consummate and fully authorize the making of said loan it is necessary for your petitioners to make formal application for the same to the Reconstruction Finance Corporation and to secure the approval of the loan by the Interstate Commerce Commission.

II.

For the purpose of meeting the requirements of Section 4 of Public Act No. 35 of the Seventy-

Third Congress of the United [1713] States, approved June 10, 1933, it will be necessary, if said loan is made, for your petitioners to enter into an agreement with the Reconstruction Finance Corporation substantially in the form attached hereto and marked Exhibit I.

Wherefore, your petitioners pray:

1. That upon the filing of this petition the court set the same for hearing and prescribe the notice to be given thereof and authorize your petitioners forthwith to apply to the Reconstruction Finance Corporation for said loan and to the Interstate Commerce Commission for its approval thereof.

2. That upon the hearing of said petition the court make its order supplemental to said order of October 5, 1938, whereby, in addition to the authority given by said order and without derogation therefrom, your petitioners be authorized, in case they find it advantageous to their trust so to do, in lieu of selling their certificates of indebtedness as authorized by said order of October 5, 1938, to borrow from the Reconstruction Finance Corporation the sum of \$10,000,000 for the purpose of paying at maturity their certificates of indebtedness now outstanding, and to evidence and secure such loan by the issuance to that corporation of their certificates of indebtedness in said aggregate amount, the terms of said certificates to be the same as those of the certificates authorized by said order of October 5, 1938.

3. That your petitioners be further authorized by such supplemental order to make an agreement with the Reconstruction Finance Corporation substantially in the form of the agreement attached hereto as Exhibit I.

WARREN OLNEY, JR.,

Counsel for Petitioners.

[1714]

State of California,

City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says: That for more than five years last past he has been the President of The Western Pacific Railroad Company and since the appointment of the Trustees of the properties of said Company he has been their Agent in immediate charge of the railroad and other property of that Company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

CHARLES ELSEY.

Subscribed and sworn to before me this 21st day of October, 1938.

[Seal]

FRANK L. OWEN,

Notary Public,

in and for the City and County of
San Francisco, State of California.

[1715]

EXHIBIT I

1938.

Reconstruction Finance Corporation,
Washington, D. C.

Dear Sirs:

Pursuant to the report and order of the Interstate Commerce Commission dated _____, 1938, in Finance Docket No. _____, approving a loan by the Reconstruction Finance Corporation (hereinafter called Reconstruction) to the undersigned Trustees in Reorganization of The Western Pacific Railroad Company, a debtor, (hereinafter called the Trustees), in the total amount of \$10,000,000, the Trustees as such and not individually, hereby agree with Reconstruction as follows:

1. The term "compensation" as used in this agreement shall include all salaries, bonuses, commissions or other payment, direct or indirect, in money or otherwise, for personal services.

2. Attached hereto as Exhibit "A" is a schedule, consisting of one sheet, showing as of October _____, 1938, the compensation of officers and employees of the Trustees at a rate in excess of \$4800 per annum. Attached hereto as Exhibit "B" is a schedule, consisting of _____ sheets, showing as of _____, 1938, the compensation of all officers and employees of the Trustees receiving compensation at a rate of \$4800 per annum or less. Attached hereto as Exhibit "C" is a statement, consisting of one sheet, showing compensation paid by any

company controlling or affiliated with or controlled by the debtor to any officer or employee of the Trustees. In addition to the compensation shown by the foregoing exhibits the Directors of The Western Pacific Railroad [1716] Company who are not officers or employees of the Trustees are each paid a fee of \$20 for each meeting attended and these fees are paid by the Trustees. The total of such fees paid in 1937 was \$460. No fees are paid other Directors.

3. While said loan from Reconstruction is outstanding and unpaid, the Trustees will not, without in each case obtaining the prior written consent of Reconstruction,

(a) Increase the compensation (either directly or through appointment to any additional office or position) of (1) any officer or employee shown on said Exhibit "A" above the rate shown on said Exhibit "A" for such officer or employee, or (2) of any officer or employee shown on said Exhibit "B" to a rate in excess of \$4800 per annum; or (3) of any Director.

(b) Elect, appoint or otherwise engage or employ any person to or for any office or position not shown on such schedules at a compensation in excess of \$4800 per annum,

4. Nothing contained in this agreement shall be deemed to prohibit the Trustees from effecting any reduction in compensation below the respective amounts set forth in Exhibit "A" or Exhibit "B," as the case may be, for the officers and employees

therein specified, or in case of a vacancy of any of the offices or positions shown on Exhibit "A," from filling such vacancy through promotion, new employment or otherwise, at the rate of compensation for such office or position set forth on Exhibit "A," or to require the Trustees to violate any of the provisions of the Railway Labor Act or of any existing or future agreements made with labor organizations. [1717]

5. If any company controlling or affiliated with or controlled by the debtor shall, directly or indirectly, increase the compensation paid by it to any officer or employee of the Trustees so as to increase the total compensation of such officer or employee above the amount thereof shown on said Exhibit "A," Exhibit "B" or Exhibit "C," the compensation payable to such officer or employee by the Trustees shall be forthwith correspondingly reduced by them so as to avoid such increase in total compensation. The Trustees will give immediate notice to Reconstruction of any such increase by any such company of such compensation paid to any officer or employee of the Trustees.

6. From time to time on request of Reconstruction, the Trustees will furnish to Reconstruction, in the form attached, schedules of all compensation currently paid to the officers and employees of the Trustees.

7. During the life of said loan the Trustees will not permit the creation of any lien upon the property of said The Western Pacific Railroad

Company, or upon the trust estate of the Trustees, which shall have priority over the lien of the Trustees' Certificates to be issued by the Trustees as security for said loan, except the liens of current taxes and such necessary expenses of the Trustees as may be allowed by the Court and given such priority.

8. This agreement shall be binding on the successors of the Trustees and shall inure to the benefit of the successors and assigns of Reconstruction.

T. M. SCHUMACHER,

SIDNEY M. EHRMAN,

Trustees in Reorganization of The
Western Pacific Railroad Company.

[Endorsed]: Filed Oct. 21, 1938. [1718]

[Title of District Court and Cause.]

ORDER PROVIDING FOR HEARING UPON
PETITION OF REORGANIZATION TRUS-
TEES FOR SUPPLEMENTAL ORDER
AUTHORIZING THEM TO BORROW \$10,-
000,000 FROM RECONSTRUCTION FI-
NANCE CORPORATION AND TO EVI-
DENCE AND SECURE SAID LOAN BY
THE ISSUANCE OF THEIR CERTIFI-
CATES OF INDEBTEDNESS.

Upon due consideration of the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the debtor, filed herein and praying for a supplemental order authorizing said

Trustees to borrow \$10,000,000 from the Reconstruction Finance Corporation and to evidence and secure said loan by the [1719] issuance of their certificate of indebtedness,

It is hereby ordered as follows:

1. That said petition shall be and it hereby is set for hearing before this court on November 7th, 1938, at 10 o'clock A. M.

2. That the said Trustees be and they hereby are directed to give notice of the said hearing. That such notice be given by the publication, on or before October 22, 1938, of a notice substantially in the following form in two newspapers of general circulation published in the City and County of San Francisco, State of California, to-wit: The Recorder and the San Francisco Examiner.

LEGAL NOTICE

In the District Court of the United States for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD
COMPANY, Debtor.

NOTICE OF HEARING UPON PETITION
OF REORGANIZATION TRUSTEES
FOR SUPPLEMENTAL ORDER AUTHORIZING THEM TO BORROW \$10,000,000 FROM RECONSTRUCTION FI-

NANCE CORPORATION AND TO EVIDENCE AND SECURE SAID LOAN BY THE ISSUANCE OF THEIR CERTIFICATES OF INDEBTEDNESS.

Notice is hereby given, pursuant to the order of the above named court, that a hearing will be held before the Honorable A. F. St. Sure, Judge of the above entitled court, at the Courtroom of the said Judge in the United States Postoffice and Courtroom Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on November 7th, 1938, at 10 o'clock A. M., or as soon thereafter as the same may be heard, upon the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization of The Western Pacific Railroad Company, praying for an order supplemental to the order of court of October 5, 1938, authorizing them to borrow \$10,000,000 from the Reconstruction Finance Corporation and to evidence and secure said loan by the issuance of their certificates of indebtedness.

T. M. SCHUMACHER,

SIDNEY. M. EHRMAN,

**Trustees in Reorganization of The
Western Pacific Railroad Company,**

[1720]

And by mailing prior to the 23rd day of October, 1938, a copy of this order and of said petition to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong.
2. Irving Trust Company, as Trustees under indenture securing Debtor's General and Refunding Mortgage Bonds.
3. A. C. James Co.
4. Reconstruction Finance Corporation.
5. The Railroad Credit Corporation.
6. Fidelity-Philadelphia Trust Co.
7. The Chase National Bank of the City of New York, as Trustees under agreement dated March 15, 1924, covering Equipment Trust Certificates.
8. The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates.
9. The Western Pacific Railroad Company.
10. The Western Pacific Railroad Corporation.
11. The Western Realty Company.
12. Central Hanover Bank and Trust Company, as Trustee under agreement dated February 1, 1937, covering Equipment Trust Certificates.

It is further ordered that the said Trustees be and they are hereby authorized to make application to the Reconstruction Finance Corporation to borrow said \$10,000,000 and to apply to the Interstate Commerce Commission for its approval of said loan.

Dated October 21, 1938.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Oct. 21, 1938. [1721]

[Title of District Court and Cause.]

SUPPLEMENTAL ORDER (1) AUTHORIZING REORGANIZATION TRUSTEES TO BORROW \$10,000,000 FROM RECONSTRUCTION FINANCE CORPORATION AND TO EVIDENCE AND SECURE SAID LOAN BY THE ISSUANCE OF THEIR CERTIFICATES OF INDEBTEDNESS AND (2) AUTHORIZING AGREEMENT BY REORGANIZATION TRUSTEES WITH RECONSTRUCTION FINANCE CORPORATION.

The petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the debtor above named, filed October 21, 1938, for an order supplemental to the court's order of October 5, 1938, whereby the said Trustees (1) would [1722] be authorized, in case they find it advantageous to their trust so to do, in lieu of selling their certificates of indebtedness as authorized by said order of October 5, 1938, to borrow from the Reconstruction Finance Corporation the sum of \$10,000,000 for the purpose of paying at maturity their certificates of indebtedness now outstanding, and to evi-

dence and secure such loan by the issuance to that corporation of their certificates of indebtedness in said aggregate amount, and (2) would be authorized to execute an agreement with Reconstruction Finance Corporation in the terms, or substantially in the terms, hereinafter set forth, came on duly to be heard this day. The said Trustees, Crocker First National Bank of San Francisco and Samuel Armstrong, Trustees under the Indenture securing the debtor's First Mortgage Bonds, and Irving Trust Company, Trustee under the indenture securing the debtor's General and Refunding Mortgage Bonds, appeared by their respective counsel, and no other person or party appeared.

The petition was heard and submitted to the court for its decision thereon. The court being now fully advised, makes its findings and order with respect to said petition as follows:

The court finds:

1. Notice of the hearing upon said petition was given to all parties interested as required by law and the previous order of this court.

2. All of the averments of said petition are true.

3. The necessity for said Trustees to provide themselves with funds for payment of their outstanding certificates of indebtedness in the aggregate principal amount of \$10,000,000 at their maturity in order to insure against a default upon them and to issue for said purpose new certificates of indebtedness in the [1723] amount of the prin-

cipal of said outstanding certificates, as found by said order of October 5, 1938, continues to exist and it is in the interest of their trust estate that said Trustees be authorized to borrow said sum from Reconstruction Finance Corporation upon the terms stated in said petition.

Now, therefore, it is hereby ordered, adjudged and decreed:

(1) That in addition to the authority given the said Trustees by said order of October 5, 1938, and without derogation therefrom, they be and they are hereby authorized, in case they find it advantageous to their trust so to do, in lieu of selling their certificates of indebtedness as authorized by said order of October 5, 1938, to borrow from the Reconstruction Finance Corporation the sum of \$10,000,000 for the purpose of paying at maturity their certificates of indebtedness now outstanding and to evidence and secure such loan by the issuance to that corporation of their certificates of indebtedness in said aggregate amount, bearing interest at the rate of 4 per cent per annum, said certificates to be issued and authenticated as provided in said order of October 5, 1938, and the terms of said certificates to be the same as those of the certificates authorized by said order.

(2) That the Trustees be and they hereby are authorized to make an agreement with the Reconstruction Finance Corporation in the following, or substantially in the following, terms:

Reconstruction Finance Corporation,
Washington, D. C.

Dear Sirs:

Pursuant to the report and order of the Interstate Commerce Commission dated _____, 1938, in [1724] Finance Docket No. _____, approving a loan by the Reconstruction Finance Corporation (hereinafter called Reconstruction) to the undersigned Trustees in Reorganization of The Western Pacific Railroad Company, a debtor, (hereinafter called the Trustees), in the total amount of \$10,000,000, the Trustees as such and not individually hereby agree with Reconstruction as follows:

1. The term "compensation" as used in this agreement shall include all salaries, bonuses, commissions or other payment, direct or indirect, in money or otherwise, for personal services.

2. Attached hereto as Exhibit "A" is a schedule, consisting of one sheet, showing as of October _____, 1938, the compensation of officers and employees of the Trustees at a rate in excess of \$4800 per annum. Attached hereto as Exhibit "B" is a schedule, consisting of _____ sheets, showing as of _____, 1938, the compensation of all officers and employees of the Trustees receiving compensation at a rate of \$4800 per annum or less. Attached

hereto as Exhibit "C" is a statement, consisting of one sheet, showing compensation paid by any company controlling or affiliated with or controlled by the debtor to any officer or employee of the Trustees. In addition to the compensation shown by the foregoing exhibits the Directors of The Western Pacific Railroad Company who are not officers or employees of the Trustees are each paid a fee of \$20 for each meeting attended and these fees are paid by the Trustees. The total of such fees paid in 1937 was \$460. No fees are paid other Directors.

3. While said loan from Reconstruction is outstanding and unpaid, the Trustees will not, without in each case obtaining the prior written consent of Reconstruction,

(a) Increase the compensation (either directly or through appointment to any additional office or position) of (1) any officer or employee shown on said Exhibit "A" above the rate shown on said Exhibit "A" for such officer or employee, or (2) of any officer or employee shown on said Exhibit "B" to a rate in excess of \$4800 per annum; or (3) of any Director.

(b) Elect, appoint or otherwise engage or employ any person, to or for any office or position not shown on such schedules at a compensation in excess of \$4800 per annum.

4. Nothing contained in this agreement shall be deemed to prohibit the Trustees from effecting any reduction in compensation below the respective amounts set forth in Exhibit "A" or Exhibit "B," as the case may be, for the officers and employees therein specified, or in case of a vacancy of any of the offices or positions shown on Exhibit "A," from filling such vacancy through promotion, new employment or otherwise, at the rate of compensation for such office or position set forth on Exhibit "A," or to require [1725] the Trustees to violate any of the provisions of the Railway Labor Act or of any existing or future agreements made with labor organizations.

5. If any company controlling or affiliated with or controlled by the debtor shall, directly or indirectly, increase the compensation paid by it to any officer or employee of the Trustees so as to increase the total compensation of such officer or employee above the amount thereof shown on said Exhibit "A," Exhibit "B" or Exhibit "C," the compensation payable to such officer or employee by the Trustees shall be forthwith correspondingly reduced by them so as to avoid such increase in total compensation. The Trustees will give immediate written notice to Reconstruction of any such increase by any such company of such compensation paid to any officer or employee of the Trustees.

6. From time to time on request of Reconstruction, the Trustees will furnish to Reconstruction, in the form attached, schedules of all compensation currently paid to the officers and employees of the Trustees.

7. During the life of said loan the Trustees will not permit the creation of any lien upon the property of said The Western Pacific Railroad Company, or upon the trust estate of the Trustees, which shall have priority over the lien of the Trustees' Certificates to be issued by the Trustees as security for said loan, except the liens of current taxes and such necessary expenses of the Trustees as may be allowed by the Court and given such priority.

8. This agreement shall be binding on the successors of the Trustees and shall inure to the benefit of the successors and assigns of Reconstruction.

T. M. SCHUMACHER,

SIDNEY M. EHRMAN,

Trustees in Reorganization of The
Western Pacific Railroad Company.

It is further ordered that the authority granted to the Trustees by the Court's order of October 21, 1938, to make formal application to the Reconstruction Finance Corporation for such loan and to make application to the Interstate Commerce Commission for approval thereof be and the same hereby is confirmed.

Dated November 7, 1938.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Nov. 7, 1938. [1726]

[Title of District Court and Cause.]

PETITION OF TRUSTEES FOR ORDER AUTHORIZING THEM TO EXTEND THEIR CERTIFICATES OF INDEBTEDNESS PRESENTLY OUTSTANDING IN THE AMOUNT OF \$10,000,000.

T. M. Schumacher and Sidney M. Ehrman, the duly appointed and qualified Trustees of the properties of the Debtor above named, hereby petition the court and represent as follows:

I.

Pursuant to authority duly given them by this Court, with the approval of the Interstate Commerce Commission, your petitioners, as such Trustees, have heretofore issued and there are now outstanding their certificates of [1727] indebtedness in the principal amount of \$10,000,000, maturing and payable on December 1, 1939. The said certificates were issued to evidence and secure a loan in the sum of \$10,000,000 from the Reconstruction Finance Corporation. The Trustees borrowed the said sum of \$10,000,000 from the Reconstruction

• Finance Corporation for the purpose of paying at maturity their certificates of indebtedness then outstanding and maturing and payable on December 1, 1938. The proceeds of said loan were used for said purpose. The said certificates then outstanding and maturing and payable on December 1, 1938, represented an indebtedness all of which was authorized and incurred for the purpose of meeting the cost of doing certain work upon and acquiring certain equipment for the railroad of the Debtor which it was necessary should be done and acquired in order that said railroad might be operated with safety and reasonable efficiency that its physical elements might be conserved and its existing business retained, and that it might furnish to the public service in the way of transportation of persons and property adequately responsive to the reasonable requirements and demands of the public upon said railroad for such service. The proceeds realized by the incurrence of the indebtedness represented by said certificates were expended in the doing of said work and the acquiring of said equipment.

II.

The orders of this Court authorizing the issuance of said certificates of indebtedness now outstanding and maturing and payable on December 1, 1939, and the orders of the Interstate Commerce Commission approving the issuance [1728] of said certificates expressly provide that said certificates rank as expenses of the administration by the Court

of the Debtor's property and as such are payable in due course of administration equally with other expenses of administration out of said property and constitute a charge and direct first lien upon said property prior in right to the debts and obligations of the Debtor and to any lien created by it; and said certificates were issued by your petitioners for value upon the representation that such was their character.

III.

At the time said certificates now outstanding and maturing and payable on December 1, 1939, were issued your petitioners anticipated that before December 1, 1939, a plan of reorganization of the Debtor providing for the redemption and payment of said certificates would be adopted by the Court and put into effect. No plan of reorganization has, however, been adopted by the Court. While your petitioners anticipate that they will be able to meet the interest charges on said certificates out of current funds, they have not, nor is there any reasonable possibility that they will have when said certificates mature, the funds wherewith to meet the principal of the certificates, either in whole or in part, and it is necessary that your petitioners obtain an extension of said loan and that they extend the said certificates as evidence of and security for said loan, in order to insure against a default upon the said certificates. Your petitioners believe that they can obtain an extension of said loan to December 1, 1940, from the Reconstruction Finance Cor-

poration, the said extension of said loan to be evidenced and secured by an extension of the said certificates of indebtedness by [1729] your petitioners to December 1, 1940, with interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semi-annually as provided in said outstanding certificates (the said certificates having been issued and deposited at a discount from the par value thereof by an amount that, when added to the interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and subject to a right on the part of the Trustees to redeem upon thirty (30) days' notice all but not less than all of said outstanding certificates on any interest payment date, the said extension of said certificates to be effectuated by stamping or writing upon each of said certificates a legend or endorsement reading substantially as follows:

"The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the

principal amount and accrued interest to the date fixed for redemption."

It is in the interest of the trust estate of your petitioners that they be authorized to obtain an extension of said loan and to extend said certificates as evidence of and security for said loan in order to insure against a default upon the said certificates when the principal thereof falls due on December 1, 1939. To consummate and fully authorize the extension [1730] of said loan it is necessary for your petitioners to make formal application for said extension to the Reconstruction Finance Corporation and to secure the approval thereof by the Interstate Commerce Commission.

IV.

Because of the possibility that your petitioners may not be able to arrange with the Reconstruction Finance Corporation for an extension of said loan it is advisable that the Court, in its order granting the authority herein asked for, reserve jurisdiction to authorize, by supplemental order made with or without notice, the issuance and sale by your petitioners of new certificates of indebtedness in the total amount of \$10,000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of providing themselves with funds for the payment of said outstanding certificates at maturity.

V.

For the purpose of meeting the requirements of Section 4 of Public Act No. 35 of the Seventy-Third Congress of the United States, approved June 10, 1933, it will be necessary, if said extension of said loan is made, for your petitioners to enter into a supplemental agreement with the Reconstruction Finance Corporation substantially in the form attached hereto and marked Exhibit I.

Wherefore, your petitioners pray.

1. That upon the filing of this petition the Court set the same for hearing and prescribe the notice to be given thereof and authorize your petitioners forthwith to apply to the Reconstruction Finance Corporation for an extension [1731] of said loan to December 1, 1940, and to the Interstate Commerce Commission for its approval thereof, and to make such other application or supplemental application to the Interstate Commerce Commission as may be required in respect to said extension of said outstanding certificates of indebtedness.

2. That upon the hearing of said petition the Court make its order whereby your petitioners will be authorized to extend to December 1, 1940, their outstanding certificates of indebtedness in the total amount of \$10,000,000, as evidence of and security for the said extension of said loan, the said certificates as extended to bear interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semi-annually as provided in said

certificates (the said certificates having been issued and deposited at a discount from the par value thereof by an amount that, when added to the interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and to be subject to a right of the Trustees to redeem upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said extension to be effectuated by the Trustees by stamping or writing upon each of the said outstanding certificates a legend or endorsement reading substantially as follows:

“The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within [1732] certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption.”

provided, however, that the Court reserve jurisdiction to provide by supplemental order, made, with or without notice, that with the approval of the Interstate Commerce Commission first had, and

obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of \$10,000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of meeting the principal of the said outstanding certificates at maturity.

3. That your petitioners be further authorized by such order to make a supplemental agreement with the Reconstruction Finance Corporation substantially in the form attached hereto as Exhibit 1.

ALLAN P. MATTHEW

Counsel for Petitioners [1733]

State of California,
City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says that for more than six years last past he has been President of The Western Pacific Railroad Company and since the appointment of the Trustee of the properties of said company he has been their Agent in immediate charge of the railroad and other property of that company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

CHARLES ELSEY

Subscribed and sworn to before me this 10th day of October, 1939.

[Notarial Seal]

FLORA HALL

Notary Public [1734]

EXHIBIT 1

1939

Reconstruction Finance Corporation,
Washington, D. C.

SUPPLEMENTAL AGREEMENT

Dear Sirs:

Pursuant to the report and order of the Interstate Commerce Commission dated _____, 1939, in Finance Docket No. _____, approving an extension to December 1, 1940, by the Reconstruction Finance Corporation (hereinafter called Reconstruction) of the loan made by Reconstruction to the undersigned Trustees in Reorganization of The Western Pacific Railroad Company, a debtor, (hereinafter called the Trustees) in the total amount of \$10,000,000 and maturing on December 1, 1939, the Trustee as such and not individually, in consideration of said extension of said loan, hereby agree with Reconstruction as follows:

The agreement made and entered into by and between Reconstruction and the Trustees on November 23, 1938, pursuant to the report and order of the Interstate Commerce Commission dated November 10, 1938, in Finance Docket No. 12,213, approving said loan by Reconstruction to the Trustees, shall be and is hereby extended and shall be and remain in full force and effect during the period of

said extension of said loan, or until December 1, 1940.

T. M. SCHUMACHER
SIDNEY M. EHRMAN

Trustees in Reorganization of The
Western Pacific Railroad Company

[Endorsed]: Filed Oct. 10, 1939. [1735]

[Title of District Court and Cause.]

ORDER PROVIDING FOR HEARING UPON
PETITION OF TRUSTEES FOR ORDER
AUTHORIZING THEM TO EXTEND
THEIR CERTIFICATES OF INDEBTED-
NESS PRESENTLY OUTSTANDING IN
THE AMOUNT OF \$10,000,000.

Upon due consideration of the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the Debtor above named, filed herein and praying for an order authorizing them to extend their certificates of indebtedness presently outstanding in the amount of \$10,000,000.

It is hereby ordered as follows:

1. That said petition shall be and it hereby is set for hearing before this court on November 6, 1939, at 10 o'clock, A. M. [1736]
2. That the said Trustees be and they hereby are directed to give notice of the said hearing. That said notice be given by publication on or before October 13, 1939, of a notice substantially in the

1830

A. C. James Co. et al. vs.

following form in The Wall Street Journal (Pacific Coast Edition) and The Recorder, two newspapers of general circulation published in the City and County of San Francisco, State of California:

LEGAL NOTICE

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 26591-S

In the Matter of

**THE WESTERN PACIFIC RAILROAD
COMPANY,**

Debtor.

**NOTICE OF HEARING UPON PETITION
OF TRUSTEES FOR ORDER AUTHORIZING
THEM TO EXTEND THEIR
CERTIFICATES OF INDEBTEDNESS
PRESENTLY OUTSTANDING IN THE
AMOUNT OF \$10,000,000**

Notice is hereby given, pursuant to the order of the above named court, that a hearing will be held before the Honorable A. F. St. Sure, Judge of the above entitled court, at the Courtroom of the said Judge, in the United States Post-office and Courthouse Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on November 6, 1939, at 10 o'clock, A. M., or as soon thereafter as the same may be heard, upon the petition of

T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization of The Western Pacific Railroad Company, praying that they be authorized:

To apply to the Reconstruction Finance Corporation for an extension to December 1, 1940, of the outstanding loan by the Reconstruction Finance Corporation to the said Trustees in the total amount of \$10,000,000; and to extend as evidence of and security for said extension of said loan their outstanding certificates of indebtedness in said total amount, the said certificates as extended to bear interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semiannually as provided in said certificates (the said certificates having been issued and deposited at a discount from the par value thereof by an amount that, when added to the [1737] interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and to be subject to a right of the Trustees to redeem upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said extension to be effectuated by the Trustees by stamping

or writing upon each of the said outstanding certificates a legend or endorsement reading substantially as follows:

“The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption.”

provided, however, that the Court reserve jurisdiction to provide by supplemental order, made with or without notice, that with the approval of the Interstate Commerce Commission first had and obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of \$10,000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of meeting the principal of the said outstanding certificates at maturity.

T. M. SCHUMACHER

SIDNEY M. EHRMAN

Trustees in Reorganization of The
Western Pacific Railroad Company

And by mailing prior to October 14, 1939, a copy of this order and of said petition to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong.
2. Irving Trust Company, as Trustee under indenture securing Debtor's General and Refunding Mortgage Bonds.
3. A. C. James Co. [1738]
4. Reconstruction Finance Corporation.
5. The Railroad Credit Corporation.
6. Fidelity-Philadelphia Trust Co.
7. The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates.
8. The Western Pacific Railroad Company.
9. The Western Pacific Railroad Corporation.
10. The Western Realty Company.
11. Central Hanover Bank and Trust Company, as Trustee under agreement dated February 1, 1937, covering Equipment Trust Certificates.

It is further ordered that said Trustees be and they are hereby authorized to make application to the Reconstruction Finance Corporation for said extension of said loan to December 1, 1940, and to the Interstate Commerce Commission for its approval thereof, and to make such other application or supplemental application to the Interstate Com-

merce Commission as may be required in respect to said extension of said outstanding certificates of indebtedness.

Dated, October 10, 1939.

HAROLD LOUDERBACK

District Judge

[Endorsed]: Filed Oct. 10, 1939. [1739]

[Title of District Court and Cause.]

ORDER (1) AUTHORIZING REORGANIZATION TRUSTEES TO EXTEND THEIR CERTIFICATES OF INDEBTEDNESS PRESENTLY OUTSTANDING IN THE AMOUNT OF \$10,000,000 AND (2) AUTHORIZING AGREEMENT BY REORGANIZATION TRUSTEES WITH RECONSTRUCTION FINANCE CORPORATION.

The petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the Debtor above named, filed October 10, 1939, for an order authorizing the said Trustees to extend to December 1, 1940, their certificates of indebtedness presently outstanding in the amount of \$10,000,000, as evidence of and security for the proposed extension to said date of the outstanding loan by the Reconstruction Finance Corporation to the said Trustees in said Trustees [1740] and the Crocker First Na-

tional Bank of San Francisco and Samuel Armstrong, Trustees under the Indenture securing the Debtor's First Mortgage Bonds, appeared by their respective counsel, and no other person or party appeared. The said petition was heard and submitted to the court for its decision thereon. The Court being now fully advised, makes its findings and order with respect to said petition as follows:

~~The Court finds:~~

1. Notice of the hearing upon said petition was given to all parties interested as required by law and the previous order of this Court.

2. The extension of said certificates to December 1, 1940, upon the terms and in the manner stated in said petition, as evidence of and security for the extension of said loan, has been approved by the Interstate Commerce Commission by its supplemental order duly made on the 21st day of November, 1939.

3. All of the averments of said petition are true.

4. Pursuant to and in accord with the authority duly granted them by this Court, with the prior approval of the Interstate Commerce Commission, said Trustees have heretofore issued and there are now outstanding their certificates of indebtedness in the principal amount of \$10,000,000, maturing and payable on December 1, 1939. The said certificates were issued to evidence and secure a loan in the sum of \$10,000,000 from the Reconstruction Finance Corporation. The said Trustees borrowed the said sum of \$10,000,000 from the Reconstruction Finance

Corporation for the purpose of paying at maturity their certificates of indebtedness then [1741] outstanding and maturing and payable on December 1, 1938. The proceeds of said loan were used for said purpose. The said certificates then outstanding and maturing and payable on December 1, 1938, represented an indebtedness all of which was authorized and incurred for the purpose of meeting the cost of doing certain necessary work upon and acquiring certain necessary equipment for the railroad of the Debtor, and the proceeds realized by the incurrence of the indebtedness represented by said certificates were expended in the doing of said necessary work and the acquisition of said necessary equipment.

5. As more fully provided in said certificates of indebtedness now outstanding and maturing and payable on December 1, 1939, and in the orders of this Court authorizing the issuance of said certificates, said certificates rank as expenses of administration by the Court of the Debtor's property and as such are payable in due course of administration equally with other expenses of administration out of said property and constitute a charge and direct first lien upon all the said property, real, personal and mixed, and the earnings and income therefrom, prior in right to the debts and obligations of the Debtor and to any lien created by it, and said certificates were issued by said Trustees for value upon the representation that such was their character.

6. No payment on account of principal of said outstanding certificates of indebtedness, or any of

them, has been made. The funds of the Trustees on hand will provide the Trustees on December 1, 1939, with the funds to meet the interest charges on said certificates but will not [1742] provide the funds to pay the principal thereof, in whole or in part. It is necessary that said Trustees obtain an extension of said loan and that they extend the said certificates as evidence of and security for said loan, in order to insure against a default upon the said certificates.

7. It is in the interest of the trust estate of said Trustees that they be authorized to obtain an extension of said loan to December 1, 1940, from the Reconstruction Finance Corporation, and to extend the said certificates of indebtedness to December 1, 1940, upon the terms and in the manner stated in said petition, as evidence of and security for said extension of said loan.

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that said Trustees be and they are hereby authorized to obtain from the Reconstruction Finance Corporation an extension of said outstanding loan to December 1, 1940, and as evidence of and security for the said extension of said loan, to extend to December 1, 1940, their outstanding certificates of indebtedness in the total principal amount of \$10,000,000, the said certificates as extended to bear interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semi-annually as provided in said certificates (the said certificates having been issued and deposited at a

discount from the par value thereof by an amount that, when added to the interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and to be subject to a right of said Trustees to redeem [1743] upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said extension to be effectuated by said Trustees by stamping or writing upon each of the said outstanding certificates a legend or endorsement reading substantially as follows:

"The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption."

provided, however, that the Court reserves jurisdiction to provide by supplemental order, made with or without notice, that with the approval of the Interstate Commerce Commission first had and obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of \$10,-

000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of meeting the principal of the said outstanding certificates at maturity.

It Is Further Ordered that, except as modified by this Order, all the terms and provisions of said certificates and the rights of the holder or holders of said certificates as such holder or holders be and they shall remain in full force and effect.

It Is Further Ordered that said Trustees be and they are hereby authorized to make an agreement with the Reconstruction Finance Corporation in the following, or substantially in the following form:

[1744]

December 1, 1939

Reconstruction Finance Corporation

1825 H Street, N. W.,

Washington, D. C.

Dear Sirs:

The undersigned Trustees of The Western Pacific Railroad Company are indebted to your Corporation on account of a certain loan represented by Trustees' Certificates in the principal amount of \$10,000,000 which mature on December 1, 1939.

In consideration of the granting by your Corporation of an extension of the maturity date of the above mentioned Trustees' Certificates, authorized by the supplemental report and sup-

plemental order of the Interstate Commerce Commission, dated November 21, 1939, in Finance Docket No. 12158, the undersigned Trustees, as such and not individually, hereby agree with your Corporation as follows:

1. The term "compensation" as used in this Agreement shall include all salaries, fees, bonuses, commissions or other payments, direct or indirect, in money or otherwise, for personal services;

2. So long as they are indebted to your Corporation, the undersigned Trustees will not increase the compensation of any of their officers, directors or employees to any amount not permitted by the terms of the agreement dated November 23, 1938, between your Corporation and the undersigned Trustees, and any written consents given by your Corporation pursuant to the provisions of said agreement;

3. The undersigned Trustees hereby ratify, confirm and reaffirm the said agreement of November 23, 1938, and each and every covenant contained in said agreement.

Respectfully submitted,

.....
.....
As Trustees of The Western
Pacific Railroad Company.

Attest:

.....
Agent for the Trustees of The
Western Pacific Railroad Company.

Dated, November 29, 1939.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Nov. 29, 1939. [1745]

[Title of District Court and Cause.]

DESIGNATION BY APPELLEE, RECON-
STRUCTION FINANCE CORPORATION,
OF ADDITIONAL PORTIONS OF THE
RECORD, PROCEEDINGS AND EVI-
DENCE TO BE CONTAINED IN THE
RECORD ON APPEAL.

Reconstruction Finance Corporation, an appellee
in connection with the appeals taken by The West-
ern Pacific Railroad Company, Debtor, The
Western Pacific Railroad Corporation, A. C. James
Co., a corporation, The Railroad Credit Corpora-
tion, and Irving Trust Company as trustee under
the General and Refunding Mortgage of The West-
ern Pacific Railroad Company, Debtor, dated Janu-
ary 1, 1932, pursuant to notices filed September 20,
1940, hereby designates, in accordance with Rule
75(a) of the Rules of Civil Procedure, the following
portions of the record, proceedings and evidence to
be included in the record on appeal to the Circuit

Court of Appeals for the Ninth Circuit, in addition to the portions of such record, proceedings and evidence designated by the appellants:

(1) Petition of The Western Pacific Railroad Company, Debtor, filed herein August 2, 1935, respecting the sale or disposition of collateral by Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Co.

(2) Opinion and order of the above-entitled court dated November 9, 1935, confirming the appointment of trustees as appointed by the court and ratified by the Commission.

(3) Claim of Reconstruction Finance Corporation filed on or before September 12, 1935.

(4) Petition of Reconstruction Finance Corporation for leave to intervene before the Interstate Commerce Commission (hereinafter called the Commission), dated October 5, 1936.

[1746]

(5) Order of the Commission dated October 7, 1936 granting intervention to the Reconstruction Finance Corporation.

(6) Exhibits marked as Exhibits Nos. 127-148, both inclusive, incorporated in the record before the Commission in this matter, which is numbered "Finance Docket No. 10913", and has heretofore been certified to and filed in the above-named court.

(7) Reply of Reconstruction Finance Corporation, filed with the Commission on or about

October 6, 1937, to the exceptions of various parties to the proposed report of the Bureau of Finance of the Commission dated August 2, 1937.

(8) Petition of Reconstruction Finance Corporation filed with the Commission for rehearing and modification of the report and order of the Commission dated October 10, 1938, if that petition be not included in Appellants' Designation No. 25.

(9) Petition for leave to file petition of intervention of Reconstruction Finance Corporation and order granting such petition and fixing date of hearing on petition of intervention, both filed December 7, 1939, petition of intervention of Reconstruction Finance Corporation and notice of filing same, both dated December 7, 1939, and order granting petition of intervention dated December 11, 1939, and notice of making and entry of said order.

(10) Memorandum statement filed herein on or about December 8, 1939, in regard to plan of reorganization certified to the above court by the Commission, with objection and claim for equitable treatment in case that plan is not approved.

(11) Petition filed herein October 21, 1938, of reorganization Trustees for supplemental order authorizing them to borrow \$10,000,000 from Reconstruction Finance Corporation and to evidence and secure said loan by the issuance of their certificates of indebtedness, and order and supplemental order entered thereon by the

above court on October 21, 1938 and November 7, 1938, respectively.

(12) Petition filed herein October 10, 1939, of Trustees for order authorizing them to extend their certificates of indebtedness presently outstanding in the amount of \$10,000,000 and order and supplemental order entered thereon by the above court on October 10, 1939 and November 29, 1939, respectively.

(13) Copy of this additional designation.

(14) All endorsements of filing and all acknowledgments and other proofs of service of any of the aforesaid records or papers in the above court, or, in lieu thereof, memorandum by the Clerk showing the due filing and/or service of said records or papers.

Dated this 17th day of October, 1940.

BROBECK, PHLEGER & HARRISON,

Crocker Building,

San Francisco, California.

C. M. CLAY,

Assistant General Counsel

Reconstruction Finance Corporation,

Washington, D. C.

Attorneys for Appellee,

Reconstruction Finance Corporation.

[Endorsed]: Filed Oct. 19, 1940. [1747]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME WITHIN WHICH
TO FILE IN CIRCUIT COURT OF AP-
PEALS THE RECORD ON APPEAL FROM
ORDER OF AUGUST 15, 1940, APPROV-
ING PLAN OF REORGANIZATION OF
DEBTOR, AND TO DOCKET ACTION IN
THE CIRCUIT COURT OF APPEALS**

It appearing to the Court that several appeals (all taken by Notice of Appeal filed herein September 20, 1940) have been taken to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court, made, filed and entered herein on August 15, 1940, Approving Plan of Reorganization of the Debtor, and that the parts of the record, proceedings and evidence in the above proceeding which have been designated for inclusion in the Record on Appeal in accordance with Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, are voluminous and it will be necessary for [1748] the Clerk of this Court to prepare for use on said appeals, a record on appeal, which shall include, without duplication, all of the matters designated for inclusion therein, by the various appellants and appellees on said appeals, and it is unlikely that such record on appeal can be prepared by the Clerk in time to permit the filing thereof in said Circuit Court of Appeals within the time limited by Rule 73(g) of said Rules of Civil Procedure;

Now, therefore, in consideration of the premises, and good cause appearing therefor, it is hereby ordered that, in accordance with said Rule 73(g) of said Rules of Civil Procedure, the time for filing said record on appeal in said Circuit Court of Appeals, and for docketing said action in said Circuit Court of Appeals, be and the same is hereby extended to and including November 30, 1940 (which date is seventy-one days from the date of the filing of the first Notice of Appeal from the aforesaid Order of August 15, 1940).

Dated: October 25, 1940.

A. F. ST. SURE

Judge

[Endorsed]: Filed Oct. 25, 1940. [1749]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE IN CIRCUIT COURT OF AP-
PEALS THE RECORD ON APPEAL FROM
ORDER OF AUGUST 15, 1940, APPROV-
ING PLAN OF REORGANIZATION OF
DEBTOR, AND TO DOCKET ACTION IN
CIRCUIT COURT OF APPEALS

It appearing to the Court that the time allowed by law (as extended by the order of this Court made October 25, 1940) for the preparation and filing in the Circuit Court of Appeals for the Ninth

Circuit of the record on appeal on the several appeals heretofore taken to said last mentioned Court from the order of this Court made, filed and entered herein on August 15, 1940, Approving Plan of Reorganization of the Debtor, is insufficient to permit of the preparation and filing of said record on appeal and the docketing of said action within the time so allowed by law, as extended by said order of this Court.

Now, therefore, in consideration of the premises and good cause [1750] appearing therefor, it is hereby ordered that, (in accordance with Rule 73 [g] of the Rules of Civil Procedure for the District Courts of the United States), the time for filing said record on appeal and docketing said action in said Circuit Court of Appeals, be and the same is hereby extended to and including December 15, 1940 (which date is eighty-six days from the date of the filing of the first notice of appeal from the aforesaid order of August 15, 1940).

Dated: November 27, 1940.

A. F. ST. SURE

Judge.

[Endorsed]: Filed Nov. 27, 1940. [1751]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME WITHIN WHICH
TO FILE IN CIRCUIT COURT OF AP-
PEALS THE RECORD ON APPEAL FROM
ORDER OF AUGUST 15, 1940, APPROV-
ING PLAN OF REORGANIZATION OF
DEBTOR, AND TO DOCKET ACTION IN
CIRCUIT COURT OF APPEALS**

It appearing to the Court that the time allowed by law (as extended by the orders of this Court made October 25, 1940, and November 27, 1940, respectively,) for the preparation and filing in the Circuit Court of Appeals for the Ninth Circuit of the record on appeal on the several appeals heretofore taken to said last mentioned Court from the order of this Court made, filed and entered herein on August 15, 1940, Approving Plan of Reorganization of the Debtor, is insufficient to permit of the preparation and filing of said record on appeal and the docketing of said action within the time so allowed by law, as extended by said Order of this Court,

Now, therefore, in consideration of the premises and good cause [1752] appearing therefor, it is hereby ordered that, (in accordance with Rule 73 [g] of the Rules of Civil Procedure for the District Courts of the United States), the time for filing said record on appeal and docketing said action in said Circuit Court of Appeals, be and the same

is hereby extended to and including December 19, 1940, (which date is ninety days from the date of the filing of the first notice of appeal from the aforesaid order of August 15, 1940).

Dated: December 12th, 1940.

A. F. ST. SURE

Judge.

[Endorsed]: Filed Dec. 12, 1940. [1752A]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME WITHIN WHICH
TO FILE TRANSCRIPT OF RECORD ON
APPEALS.**

Good cause appearing therefor, it is hereby ordered that the time for filing the transcript of record on the appeals heretofore taken to this Court by The Western Pacific Railroad Company, A. C. James Co., The Western Pacific Railroad Corporation, The Railroad Credit Corporation and Irving Trust Company as Trustee under the General and Refunding Mortgage of the Debtor, from the order of the United States District Court for the Northern District of California, Southern Division, made, filed and entered August 15, 1940, approving the Plan of Reorganization of the above named Debtor, which said time (as fixed by Rule 73 of the Rules of Civil Procedure for the District Courts of the United States, and three orders of the Dis-

trict Court, dated October 25, 1940, November 27, 1940 and December 12, 1940, respectively), will expire December 19, 1940 (i.e., ninety days after the date upon which the Notices of Appeal on said appeals were filed in said District Court) be and the same is hereby extended to and including December 31, 1940.

Dated: December 18, 1940.

CURTIS D. WILBUR

Senior U. S. Circuit Judge.

[Endorsed]: Filed Dec. 18, 1940.

PAUL P. O'BRIEN,

Clerk.

[Endorsed]: Filed Dec. 18, 1940. Walter B. Maling, Clerk.

A true copy.

Attest: December 18, 1940.

PAUL P. O'BRIEN,

Clerk. [1753]

[Title of District Court and Cause.]

ORDER PROVIDING FOR OMISSION OF
COPIES OF CERTAIN ORIGINAL EX-
HIBITS FROM RECORD ON APPEAL AS
MADE UP BY CLERK AND FOR THE
TRANSMISSION OF SUCH ORIGINAL
EXHIBITS TO THE CIRCUIT COURT OF
APPEALS

It appearing to the Court that several appeals
all taken by notices of appeal filed herein on Sep-

tember 20, 1940) have been taken to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 15, 1940, approving plan of reorganization of the Debtor;

And it further appearing that (1) the original exhibits (except those numbered 1, 42, 76 and 127-148, both inclusive) which were offered in evidence on the hearing in the above matter before the Interstate Commerce Commission of the United States (hereinafter called "Commission") in the proceeding designated by the Commission as Finance Docket No. 10913, as shown by the transcript and record of the proceedings before the Commission heretofore certified by it to [1754] this Court and filed herein, and (2) the original exhibits (except the "Stipulation as to Facts not in Dispute" and the memorandum of corrections therein, identified by the witness Charles Elsey, which said stipulation and memorandum were offered in evidence and filed on the hearing next mentioned, and the exhibits which are annexed to said "Stipulation as to Facts not in Dispute", or were filed as a part thereof) which were offered in evidence on the hearing in this Court, on January 22, 1940, of the Objections to the plan of reorganization of the Debtor certified to this Court by the Commission, are of such character and form as to be unsuitable for inclusion in the record on appeal to be prepared by the Clerk of this Court as required by the Rules of Civil Procedure for the District Court

of the United States, but that it is necessary that said original exhibits be inspected and considered by said Circuit Court of Appeals in connection with said appeals as part of the Record on Appeal thereon,

Now, therefore, in consideration of the premises, and good cause appearing therefor,

It is hereby ordered that all of the original exhibits (other than those excepted as aforesaid) which were received in evidence on the hearing in the above matter before the Commission as shown by the transcript and record of the proceedings before the Commission heretofore certified by it to this Court and filed herein, and all of the original exhibits (other than those excepted as aforesaid) which were received in evidence on said hearing, in this Court on January 22, 1940, shall be transmitted by the Clerk to the appellate court, in lieu of copies of such exhibits, and shall constitute a part of the record on appeal on said appeals.

Dated: November 27, 1940.

A. F. ST. SURE

Judge.

[Endorsed]: Filed Nov. 27, 1940. [1754-A]

Before the
Interstate Commerce Commission

Finance Docket 10913.

Western Pacific Railroad Company Reorganization

TESTIMONY

Hearing Room C, I.C.C. Building,
Washington, D. C.

Monday, March 23, 1936.

Met pursuant to notice at 10:00 o'clock a. m.

Before:

R. T. Boyden and
Harvey H. Wilkinson, Examiners.

Appearances:

Frank C. Nicodemus, Jr., 37 Wall Street, New York City, appearing for the Western Pacific Railroad Company.

Robert E. Coulson, 40 Wall Street, appearing for A. C. James Company.

James B. Alley, C. C. McChord, and C. M. Clay, Washington, D. C., appearing for Reconstruction Finance Corporation.

Daniel Willard, Jr., Transportation Building, Washington, D. C., appearing for the Railroad Credit Corpora- [1756] tion.

Robert T. Swaine, 15 Broad Street, New York City, appearing for Metropolitan Life Insurance Company; Prudential Life Insurance Company; New York Life Insurance Company; Mutual Benefit Life Insurance Company; John Hancock Life

Insurance Company; Travellers Life Insurance Company; Home Life Insurance Company and Chase National Bank, (Pledgee), holding \$16,941,400 First Mortgage Bonds of Debtor, acting through Frederick H. Ecker, John W. Stedman and Reeve Schley, as an Executive Committee.

Orville W. Wood, 15 Broad Street, New York City, appearing for Trustees under Debtor's First Mortgage and trustee under Debtor's General and Refunding Mortgage. [1757]

PROCEEDINGS

Examiner Boyden: The Interstate Commerce Commission has assigned for hearing at this time and place, Finance Docket No. 10913, proceeding for reorganization of the Western Pacific Railroad Company.

Evidence will be received in support of and in opposition to the plan of reorganization which has been filed by the Western Pacific Railroad Company, and other plans of reorganization also will be received by parties having the requisite interest in the proceedings, and evidence in support of and in opposition to those claims.

Who appears for the Western Pacific Railroad Company?

Mr. Nicodemus: Frank C. Nicodemus, Jr.

Examiner Boyden: Are there other appearances?

Mr. Swaine: I appear for the Metropolitan Life Insurance Company, Prudential Life Insurance Company, New York Life Insurance Com-

pany, Mutual Benefit Life Insurance Company, John Hancock Life Insurance Company, Travellers Life Insurance Company, Home Life Insurance Company and Chase National Bank, the latter as Pledgee, together representing \$16,941,400 principal amount of First Mortgage Bonds of the Debtor.

Examiner Boyden: Have you filed a petition of intervention, Mr. Swaine?

Mr. Swaine: No, I have not. [1760]

Examiner Boyden: Do you expect to do so?

Mr. Swaine: Probably.

Examiner Boyden: Are there other appearances?

Mr. Coulson: I am appearing on behalf of A. C. James Company, security creditor. Robert E. Coulson, 40 Wall Street, New York City.

Examiner Boyden: Have you filed a petition?

Mr. Coulson: I have not, sir, but probably will. I might say that the court has classified the claim of this creditor as a separate class in the order entered in the proceeding in the California court.

Examiner Boyden: Have you been admitted to practice before the Commission?

Mr. Coulson: Yes.

Examiner Boyden: Are there other appearances?

Mr. Willard: The Railroad Credit Corporation appears by D. Willard, Junior, counsel. Petition of intervention has been granted by the Commission by order dated March 14th.

Mr. Boyden: Are there any other appearances?
(No response.)

Since the filing of its petition in the United States District Court for the Northern District of California, southern division, the Western Pacific Railroad Company has filed in the proceedings before the court various [1761] petitions and accounting records. Other documents have also been filed by other parties.

Pursuant to the rules of the United States Supreme Court, many of those documents have been transmitted to the Commission and filed in Finance Docket 10913. They are open to public inspection. May it be understood that those documents heretofore filed in the court proceedings and those which may hereafter be filed in such proceedings and transmitted to the Commission will constitute a part of the record in this proceeding?

Mr. Nicodemus: Debtor so stipulates.

Examiner Boyden: You may proceed, Mr. Nicodemus.

Mr. Nicodemus: In the interest of brevity we will omit any preliminary statements and go right ahead with the witnesses.

We will call as the first witness, Mr. Michael J. Curry.

MICHAEL J. CURRY

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Will you state your connection with the Western Pacific Railroad Company?

A. I am vice president and assistant secretary of the Western Pacific Railroad Company.

Q. You also are an officer of the corporation?

[1762]

A. I am secretary and treasurer of the Western Pacific Railroad Corporation.

Q. Mr. Curry, before we proceed further, the order of the Commission fixing a hearing at this time and place requires notice to be published. Have you evidence of the publication of that?

A. I have evidence of the publication.

Mr. Nicodemus: May we file this as a part of the record? That is an affidavit of the publication of the notice in the Wall Street Journal at San Francisco and the New York Herald-Tribune in New York. You need not give it an exhibit number, because I have none to distribute.

Examiner Boyden: It may be filed as part of the record.

(The documents referred to were thereupon filed.)

Q. (By Mr. Nicodemus) Are you custodian of

(Testimony of Michael J. Curry.)

the record of the action of the Executive Committee of the Railroad Company? A. I am.

Q. You also have duplicate records of the action of the board of directors when held in San Francisco? A. I have.

Q. The plan of reorganization pursuant to which this hearing has been held was filed on the 8th of February in the United States Court at San Francisco and on the same [1763] date with the Interstate Commerce Commission? A. It was.

Q. Can you identify that as a counterpart of the plan so filed?

A. I do identify it as such plan.

Q. On what date was that plan submitted to the board of directors of the railroad company?

A. On February 7, 1936.

Q. Have you a certified copy of the minutes adopted by the board of directors on that date pertaining to the plan? A. I have.

Q. Can you produce it?

A. I identified it as a certified copy of the action taken at meeting of the board of directors of the Western Pacific Railroad Company, held on February 7, 1936, at its office in San Francisco, California.

Mr. Nicodemus: I offer those documents in evidence.

Examiner Boyden: Is there any objection?

(Testimony of Michael J. Curry.)

The plan of reorganization will be received as exhibit 1, and the copy of the minutes will be received as exhibit 2.

(Exhibits 1 and 2, Witness Curry, received in evidence.)

[Printer's Note: Exhibit 1 (Plan of Reorganization effective January 1, 1936) is not set out here as it already appears at page 19 of this printed record.]

Mr. Nicodemus: That finishes this witness.

[1764]

Examiner Boyden: Is there any examination of this witness? The witness is excused.)

(Witness excused.)

Mr. Nicodemus: Charles Elsey.

CHARLES ELSEY

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Mr. Elsey, what is your name and residence?

A. Charles Elsey, Oakland, California.

Q. And your occupation?

A. President of the Western Pacific Railroad Company.

Q. How long have you been connected with the Western Pacific Railroad Company?

A. Since 1907.

(Testimony of Charles Elsey.)

Q. The present company was reorganized in 1916, so that your connection goes back to the predecessor company, is that correct?

A. That is correct.

Q. When did the predecessor company commence operations? A. July 1, 1911.

Q. So you went with the Company when it was a paper company and was not operating then?

A. No, the company was incorporated on March 3, 1903. [1765]

Q. But had not started formal operations?

A. Commenced formal operations, as I said before, on July 1, 1911.

Q. You started in with the predecessor company as assistant treasurer, is that correct?

A. That is correct.

Q. You later became treasurer?

A. Yes, sir.

Q. And subsequently vice president. In what year was that? A. 1921.

Q. Vice president in charge of finance in 1921?

A. Yes, sir.

Q. And continued in that office until 1929. Is that correct? A. Yes, sir.

Q. When you became executive vice president and afterwards president? A. Yes, sir.

Q. And you were elected president in 1932, and have held that position continuously?

A. Yes, sir.

(Testimony of Charles Elsey.)

Q. Throughout the entire period of your service, you have been more or less identified with the financial end of the property? [1766]

A. That is correct.

Q. To complete the record, will you give the date of the prior receivership, its inception and its termination?

A. Went into receivership on March 4, 1915; was in the hands of a receiver until July 14, 1916.

Q. That was a model of brevity, then, as to that receivership? A. Yes, sir.

Q. Mr. Elsey, will you give a brief description of the present lines of railroad of the debtor, the Western Pacific Railroad Company?

A. The main line of the Western Pacific extends from Oakland, California, to Salt Lake City, a distance of 924.17 miles; another main line from Keddie, California to Bieber, California, a distance of 111.81 miles—a total main line mileage of 1035.98.

The main line from Oakland to Salt Lake City serves the principal cities in northern California, such as San Francisco, Oakland, Stockton, Sacramento, Marysville and Oroville, also the main shipping points in Nevada.

The principal branch lines are the San Jose Branch, which takes off the main line at Niles and terminates at San José, a city of 57,000 population.

This line serves the Santa Clara Valley, one of the richest agricultural territories in the state, a distance [1767] of 23.07 miles.

(Testimony of Charles Elsey.)

The Terminous branch takes off the main line at Terminous Junction and terminates at Terminous, a distance of 7.92 miles.

This branch line serves a territory, the principal commodities of which are celery, asparagus and other vegetables.

The Calpine Branch, 12.62 miles and the Loyaltown Branch, 12.79 miles—both of these branches serve a lumber territory in Plumas County.

The Reno Branch takes off the main line at Reno Junction and runs to Reno, a distance of 33.11 miles.

A branch of Burmester to Warner cuts off the main line at Burmester and connects with the Toole Valley Railroad at Warner, which latter railroad serves the International Smelter, a distance of 15.52 miles.

Miscellaneous branches, 72.14.

Total branches of 177.17 miles. Grand Total, 1213.15 miles, with the water mileage between San Francisco and Oakland of 4.20 or a total mileage of 1217.35.

Q. Summing it all up, the roads traverse at least three states, California, Nevada and Utah, and the carrier is engaged in interstate commerce. Is that correct? A. That is correct.

Q. You have referred to a line to Bieber. Will you state [1768] briefly the history of the construction of that line, which is referred to from time to time as the northern California extension?

A. That line takes off of our Salt Lake-San Francisco Line at Keddie, California, and runs in

(Testimony of Charles Elsey.)

a northwesterly direction to Bieber, where we have a connection with the Great Northern Railroad. This line serves a very important lumber district, and at Westwood is located the largest lumber mill in California, which this line serves.

Q. When was the line constructed?

A. It was commenced in 1929 and completed in November, 1931.

Q. When did you start to carry its operations in the accounts of the parent company?

A. In November, 1931.

Q. So the accounts prior to that are somewhat distorted by the fact that the earnings of that line are not included. Is that correct?

A. Yes, sir.

Q. How was that financed, Mr. Elsey?

A. The total cost was approximately ten million dollars. It was financed 50 per cent by the issuance of our first mortgage bonds. Our first mortgage bond is a closed issue of \$50,000,000 and this \$5,000,000 exhausted our ability to issue bonds under this mortgage. It was therefore [1769] necessary to finance the balance of the line by the issuance of debentures, which were sold to the A. C. James Company.

Q. And the A. C. James Company took a junior position in respect of half of the cost of that construction?

A. Yes, sir. I might say in connection with the northern California extension that we have a full

(Testimony of Charles Elsey.)

line of rates with the Great Northern Railway, and the Santa Fe connects with our line at Stockton, with which company we also have a full line of rates, making a north and south route serving all the points on the Great Northern in Washington and Oregon and all points on the Santa Fe System.

Q. Mr. Elsey, coming to the plan of reorganization in support of which you are appearing as a witness, will you state in the order substantially of their importance what you regard as the outstanding features of this plan? I take it that the feature of outstanding and primary importance is the reduction of fixed charges? A. Yes, sir.

Q. The extent of that reduction is indicated by the plan itself, is it not? Will you, however, state those figures again so that this will appear in your testimony?

A. Our present fixed charges amount to \$3,180,053, and under the plan of reorganization our fixed charges will [1770] be \$1,027,036.

Q. So substantially 66 $\frac{2}{3}$ per cent of the fixed charges have been eliminated?

A. Yes, sir.

Q. The amended section 77 of the Bankruptcy Act describes in paragraph C of section 77 that a plan approved under the Act shall provide for interest charges in such an amount that after due consideration of the probable prospective earnings of the property in the light of its earnings experience and all other relevant facts, there shall be adequate coverage for such fixed charges by the probable

(Testimony of Charles Elsey.)

earnings available for the payment thereof.

Do you feel and are you prepared to give the reasons why you feel that this plan meets that test?

A. Yes, sir.

Q. Looking into the immediate past, Mr. Elsey, the period from 1929 to 1935 was a very severe period for successful railroad operation, was it not?

A. Yes, sir.

Q. Do you think a period of stress equally severe may reasonably be anticipated within the next quarter of a century? A. I would not think so.

Q. So that a first mortgage bond with a 30-year maturity put out under this plan, if it would have stood up [1771] during that period, would in all probability stand up during the 30-year period of its life? Is that correct? A. Yes, sir.

Q. Have you prepared a statement showing the interest available for fixed charges during that period? A. Yes, sir.

Q. 1929 to 1935? A. Yes, sir.

Q. That was prepared at your request in the regular course of business from the records of the company? A. Yes, sir.

Q. You believe it to be correct?

A. Yes, sir.

Mr. Nicodemus: I offer it in evidence.

Examiner Boyden: Is there any objection?

The exhibit will be marked exhibit 3, for identification.

(Exhibit 3, Witness Elsey, marked for identification.)

(Testimony of Charles Elsey.)

Q. (By Mr. Nicodemus) In connection with that exhibit, the plan provides for a contingency reserve fund of \$500,000 to be applied to the payment of interest in any lean year that we might encounter?

A. That is correct.

Q. That application of that contingency reserve fund is [1772] also shown by this statement?

A. Yes, sir.

Q. It would have been applied to make up the deficiency in the years 1930 and 1931?

A. 1931 and 1932.

Q. Mr. Elsey, the next feature of the plan which you wish to comment on is what?

A. The next most important point is putting the property into good operating condition. The plan of reorganization provides for an expenditure of \$9,500,000 on road and equipment over a period of three years.

It is my opinion that with this expenditure the road will be brought to normal efficiency and we will be able to operate the property in the future without any abnormal expenditures as far as maintenance of way and structures is concerned, and also maintenance of equipment. The program will provide that during these three years, all the old rail will have been relaid, a considerable portion of the road ballasted, and taking up the deferred maintenance on our equipment, particularly freight equipment.

Q. Do you feel that after that \$9,500,000 is expended, the road will be in A-1 condition for opera-

(Testimony of Charles Elsey.)

tion and will not require any extraordinary maintenance in the future, barring floods, and acts of God, or something of that sort?

A. Yes, sir. [1773]

Q. Arrangements have been perfected, as I understand it, subject to the approval of the Commission, for the borrowing of that ten million dollars?

A. Yes, sir.

Q. I say ten million dollars because \$500,000 of the \$10,000,000 is to be applied to the creation of the contingency reserve fund to which you have already referred, so you have net capital available for completing this rehabilitation program of \$9,500,000. That is being obtained from the Reconstruction Finance Corporation on what you regard as favorable terms? A. Very favorable.

Q. You can draw the money down over a three year period as and when you need it?

A. Yes, sir.

Q. And you can call on the Reconstruction Finance Corporation to buy, regardless of the then market conditions, is that correct?

A. That is correct.

Q. Will you state the condition upon which the Reconstruction Finance Corporation made that undertaking? They required that the present indebtedness of the railroad company to the Reconstruction Finance Corporation be advanced and given the same rank that the first mortgage bonds hold; is that the condition? [1774]

(Testimony of Charles Elsey.)

A. That was the condition on which they agreed to purchase this \$10,000,000 of our new first mortgage bonds.

Q. We will pass to the next feature of the plan as to which you propose to comment. My memorandum indicates that in that connection you wish to speak about the contingent interests, the bonded debt that will be created under the plan carrying only the contingent interest.

A. That is covered by our income bonds, and that is contingent for two years, or eleven per cent.

Q. You mean, it is cumulative for two years?

A. Yes, sir.

Q. So that maximum accumulation will never be more than approximately 11 per cent. But before we get to that, the aggregate of the fixed charge bonds and the income bonds is greater than the present bonded debt of the reorganized company, and that has been commented on somewhat in connection with the public discussions of this plan.

Will you explain that increase to the Commission?

A. Our present outstanding debt exclusive of equipment trust obligations is \$49,290,100 of first mortgage bonds. Under the plan of reorganization the mortgage debt of all classes will total \$75,543,405, an increase of \$25,253,305.

This increase is more than offset by the uncapitalized expenditures. For example, A. C. James Company [1775] contributed \$4,999,800 to finance the

(Testimony of Charles Elsey.)

construction of the Northern California extension and took a junior position.

In addition to this, the company's uncapitalized capital expenditures down to September 30, 1935, amounted to \$22,275,780.

New capital expenditures under the rehabilitation program are estimated at \$3,085,323, making a total of \$30,360,903, which is approximately \$5,000,000 more than the increase in funded debt.

But only a relatively small portion of this funded debt is of fixed interest obligations.

To further explain this situation, there was invested in the property by the predecessor company, the Western Pacific Railway Company, to July 14, 1916, the date that the company went into the hands of the receiver, \$82,398,852. The present company invested in the property from July 14, 1916 to December 31, 1935, \$76,967,015, making a total of \$159,365,867.

With the capital expenditures in round figures around \$3,000,000, it is a grand total of \$162,365,867. This is against a fixed interest debt under the plan of reorganization of only \$25,675,900. This latter figure includes the \$10,000,000 of new bonds which we propose to sell to the Reconstruction Finance Corporation. [1776]

Q. Mr. Elsey, before there is any definite obligation to pay contingent interest on income bonds, do you feel that adequate working funds will be available to you to enable you to properly operate and maintain the property?

A. Yes, sir.

(Testimony of Charles Elsey.)

Q. Will you explain that feature of the plan?

A. In the plan of reorganization there is set up what is called the capital fund. Money from the capital fund can be spent for additions and betterments or for the payment of principal and installments on equipment-trust notes before any money is allocated to the income bondholder, either as interest or for sinking fund.

Q. The amount of that fund during the first five-year period of the plan is what?

A. \$500,000 a year.

Q. Is that subsequently increased to a larger amount?

A. Yes, sir. For the next five years it is increased to a million dollars a year, and thereafter, 3 per cent of our gross operating revenues.

Q. So you feel there is no danger whatever of the property being starved under this plan?

A. None whatever.

Q. So much for that. You have already adverted to the limited accumulative feature of the income bonds. Do you wish to add anything to what you have already said on [1777] that subject?

A. No, I cannot say that I do.

Q. That is, there is no danger under this plan of heavy accumulations, such as have been criticised in other reorganizations, where income bonds were the feature?

A. No, sir.

Q. A small issue of junior lien bonds is allocated to the A. C. James Company and the Railroad

(Testimony of Charles Elsey.)

Credit Corporation under this plan. Is the interest cumulative or non-cumulative?

A. Non-cumulative entirely.

Q. That is entirely non-cumulative, so there is no problem in connection with that?

A. None whatever.

Q. Mr. Elsey, the director of the Bureau of Finance communicated with the Railroad Corporation, and requested that certain exhibits be assembled. Have you taken up that request?

A. Yes, sir.

Q. First on the list is the articles of incorporation and by-laws. That is a formal exhibit which I offer without any comment. It speaks for itself.

Examiner Boyden: Let the exhibit, including the articles of incorporation of the Western Pacific Railroad Company be marked exhibit 4. [1778]

(Exhibit 4, Witness Elsey, marked for identification.)

Mr. Nicodemus: We next offer the first mortgage of the Western Pacific Railroad Company to the First Federal Trust Company and Henry E. Cooper, Trustees, dated June 26, 1916.

Q. Mr. Elsey, in connection with this exhibit has the name of the corporate trustee been changed?

A. Yes, sir.

Q. What is the present name of the corporate trustee?

A. Crocker First National Bank of San Francisco.

(Testimony of Charles Elsey.)

Q. Has Henry E. Cooper, originally the individual trustee, continued to serve as such, or has he been superseded? A. Yes, sir.

Q. He has been superseded? A. Yes, sir.

Q. By Samuel Armstrong?

A. That is correct.

Q. The papers incident to the substitution of Mr. Armstrong are annexed? A. Yes, sir.

Mr. Nicodemus: I offer the mortgage and the accompanying papers as exhibit 5.

Examiner Boyden: Let it be marked exhibit 5.

(Exhibit 5, Witness Elsey, marked for identification. [1779])

Mr. Nicodemus: We next offer the general re-funding mortgage of the Western Pacific Railroad Company to the Chase National Bank of the City of New York, trustee, dated as of January 1, 1932.

Examiner Boyden: Let it be marked Exhibit 6.

(Exhibit 6, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) With reference to the exhibit just introduced, Mr. Elsey, that mortgage was created quite recently. Will you state the amount of bonds that have been authenticated under that mortgage? Certain bonds were authenticated by the trustee in place of the treasurer of the company. Will you state the position of those bonds at the present time?

(Testimony of Charles Elsey.)

A. Those bonds amount to \$18,999,500, and are pledged as collateral under notes of the A. C. James Company, Reconstruction Finance Corporation, and the Railroad Credit Corporation.

Q. None of the bonds of that issue is outstanding in the hands of the public and the other issue is canceled under the plan? Is that correct?

A. Yes, sir.

Mr. Nicodemus: I next offer the certificate for common stock of the debtor. [1780]

Examiner Boyden: Let it be marked exhibit 7.

(Exhibit 7, Witness Elsey, marked for identification.)

Mr. Nicodemus: We then offer the certificate for preferred stock of the debtor.

Examiner Boyden: Let it be marked exhibit 8.

(Exhibit 8, Witness Elsey, marked for identification.)

Mr. Nicodemus: The next exhibit which we offer pursuant to the request of the Commission is a complete and detailed statement of the short term obligations of the carrier, the three issues of notes to which the witness has just referred, and the schedules of collateral therefor, and we believe all the information necessary to enable the Commission to determine the status of these short term notes.

Examiner Boyden: Let it be marked exhibit 9.

(Exhibit 9, Witness Elsey, marked for identification.)

(Testimony of Charles Elsey.)

Mr. Nicodemus: Exhibit 9 is supplemented by a brief statement of data pertaining to other securities of the company, which might go in as exhibit 10. This shows the status of the equipment, trusts and unsecured indebtedness, and like items.

Examiner Boyden: Let it be marked exhibit 10. [1781]

(Exhibit 10, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Mr. Elsey, have you caused to be prepared an analysis of the road's available balance sheet? A. Yes, sir.

Q. What date has been selected for that purpose? A. December 31, 1935.

Q. The plan of reorganization contemplates that the old company will pass out as of midnight of that date, and that the new company will start to function on January 1, 1936?

A. That is the reorganized company.

Mr. Nicodemus: We offer that in evidence.

Examiner Boyden: Let the analysis of the balance sheet be marked exhibit 11.

(Exhibit 11, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you prepared or caused to be prepared a similar analysis of the investment account as of the same date?

A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. Nicodemus: We offer that analysis in evidence.

Examiner Boyden: Let it be marked exhibit 12.

(Exhibit 12, Witness Elsey, marked for identification. [1782] fication.)

Mr. Nicodemus: Mr. Examiner, the Commission requested traffic density charts. We have a traffic density chart for 1934. It has very little significance in this proceeding, because there are no divisional liens or anything of that character.

However, we offer it in evidence. We could supply years if needed, but we think it would serve no particular useful purpose. It will be substantially the same as 1934.

The Witness: Yes.

Examiner Boyden: Let the 1934 traffic density chart be marked exhibit 13.

(Exhibit 13, Witness Elsey, marked for identification.)

Mr. Nicodemus: We also have prepared at the request of the Commission a brief reference to the corporation laws under which the debtor is organized.

Examiner Boyden: Let it be marked exhibit 14.

(Exhibit 14, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you caused to be prepared, Mr. Elsey, a statement showing the pres-

(Testimony of Charles Elsey.)

ent status of equipment with regard to its age, condition, ledger value, and accrued depreciation as of December 31st? [1783] A. Yes, sir.

Q. That was prepared by you and for you in the usual course of business by the auditor or superintendent of motive power?

A. The superintendent of motive power.

Q. Examiner Boyden: Let it be marked exhibit 15.

(Exhibit 15, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you any comment to make on that exhibit?

A. None other than the fact that under our plan of reorganization with the expenditure of a portion of our \$9,500,000 for equipment we feel that it will bring our equipment up to good operating condition.

Q. Mr. Elsey, in view of the fact that the plan of reorganization is proposed to be made effective as of January 1, 1936, have you requested the auditor to prepare and has he prepared a pro forma balance sheet for the reorganization company?

A. Yes, sir.

Q. Is the auditor available for examination should anyone present care to make inquiry as to the method by which this was prepared?

A. Yes, sir.

Q. That is also true as to the other financial exhibits, [1784] the analysis of investment account and the analysis of balance sheet?

(Testimony of Charles Elsey.)

A. That is correct.

Q. Have you any comment to make on this pro forma balance sheet? A. No, sir.

Mr. Nicodemus: It is offered in evidence.

Examiner Boyden: Let the pro forma general balance sheet be marked as exhibit 16.

(Exhibit 16, Witness Elsey, marked for identification.)

Mr. Nicodemus: In order to make the plan of reorganization effective, it is necessary to execute certain new instruments. First among these is the first mortgage, next in importance the income mortgage, then the junior lien mortgage, escrow agreement, and the voting trust agreement.

Drafts of these five instruments have been prepared.

Under the plan the so-called Ecker Committee, the committee of which Mr. Frederick H. Ecker is Chairman, have reserved the right to review these documents, and we offer them with the understanding that they are subject to revision by counsel for the committee. There is nothing sacrosanct about these documents. We will be glad to have the suggestions of any of the interested counsel. [1785]

We now tender them as the documents that we are required to execute under the plan.

First, I will offer the first mortgage.

Examiner Boyden: Let it be marked Exhibit 17.

(Exhibit 17, Witness Elsey, marked for identification.)

(Testimony of Charles Elsey.)

Q. (By Mr. Nicodemus) Have you any comments to make on the first mortgage, Mr. Elsey?

A. The first mortgage will be dated January 1, 1936, and will be a closed mortgage of \$50,000,000. Under the plan of reorganization there will be \$15,675,900 of these bonds issued to the present first mortgage bondholders and the Reconstruction Finance Corporation.

\$10,000,000 will be sold to the Reconstruction Finance Corporation to provide funds for the contingency reserve fund and the improvement program. \$1,000,000 will be issued and placed in the treasury. The balance of \$23,324,100 will be reserved for future additions and betterments. The bonds or deposited cash can only be drawn down to the extent of 75 per cent of the actual net expenditures.

Q. Is that a conservative mortgage, in your judgment, in respect to the limitations on the issuance of future bonds? A. Yes, sir. [1786]

Q. The trustees under that mortgage are the Crocker First National Bank of San Francisco and Samuel Armstrong? A. Yes, sir.

Mr. Nicodemus: We next offer the proposed income mortgage to the United States Trust Company, Trustee.

Examiner Boyden: Let it be marked exhibit 18.

(Exhibit 18, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you any comment to make on the income mortgage?

(Testimony of Charles Elsey.)

A. The income mortgage is dated January 1, 1936. It has a life of 75 years. It consists of two series, series A and series B.

Q. Fifty years, that is?

A. Pardon me; fifty years.

Series A is to be issued in the amount of \$20,887,398, and Series B in a like amount, making a total of \$41,774,796. It will be a closed mortgage.

Q. The interest is wholly contingent upon available net income? A. Yes, sir.

Q. The subject of available net income has been negotiated at considerable length with the representatives of the insurance companies and the Ecker Committee? A. Yes, sir. [1787]

Q. You have already referred to the fact that it is cumulative for two years' interest only?

A. Yes, sir.

Mr. Nicodemus: We next offer the proposed junior lien mortgage to the Chase National Bank of the City of New York.

Q. Have you any comment to make upon that?

A. It is dated January 1, 1936. It is for a period of 75 years. The total amount to be issued under this mortgage is \$8,092,709. It is a closed mortgage at that figure. The bonds under this mortgage are to go to the A. C. James Company and the Railroad Credit Corporation.

Q. In accordance with the plan?

A. Yes, sir.

(Testimony of Charles Elsey.)

Examiner Boyden: Let it be marked exhibit 19.

(Exhibit 19, Witness Elsey, marked for identification.)

Mr. Nicodemus: Under the provisions of the plan, one-half of the equity is placed in escrow as security for the payment of interest at a future income period. Such an instrument has been prepared and we now offer the escrow agreement.

Examiner Boyden: Let it be marked exhibit 20.

(Exhibit 20, Witness Elsey, marked for identification.) [1788]

Mr. Nicodemus: Last of all, we offer the proposed voting trust agreement.

Q. I call your attention to the fact, Mr. Elsey, that the names of the voting trustees are not inserted in the voting trust agreement. The plan of reorganization provides in substance that at or before the hearing on the plan, which is this hearing, three voting trustees shall be appointed, which will be nominated by the railroad company and acceptable to the bondholders committee; that is, the Ecker Committee.

Has the railroad company made its nominations?

A. Yes, sir.

Q. Have the voting trustees been selected?

A. Two.

Q. What has happened to the third?

A. There was disagreement as to the third.

Q. That is still in negotiation, then?

(Testimony of Charles Elsey.)

A. Yes, sir.

Mr. Nicodemus: I will pass that.

We offer the voting trust agreement with the understanding that the name of the third trustee will be supplied at the earliest practicable date. We regret very much that it has not been already.

Examiner Boyden: Let it be marked exhibit 21.

(Exhibit 21, Witness Elsey, marked for identification. [1789] fication.)

Q. (By Mr. Nicodemus) Mr. Elsey, you have already offered an exhibit showing how this plan would work if applied retroactively. Have you any exhibit now that will show how it will operate in the future, according to the best estimates?

A. Yes, sir.

Q. What have you prepared in the nature of a forecast?

A. I have prepared an estimate of revenues and income account for the five year period, 1936 to 1940, inclusive. This information that is disclosed in this estimate was prepared in the regular same manner that we prepare our ordinary estimates in preparation of our forecast.

Q. You have reviewed this personally with care?

A. Yes, sir.

Q. You believe it to be reasonably conservative?

A. Yes, sir; I think it is very conservative, particularly as far as our estimates on operating revenues are concerned.

(Testimony of Charles Elsey.)

Q Witnesses are available to testify as to the details of this statement should anyone desire to analyze the estimates? A. That is correct.

Q. Who will testify as to the assumed operating revenues?

A. Mr. John F. Bon, freight traffic manager. [1790]

Q. And another witness will testify as to the operating expenses?

A. Yes, sir. Mr. Edward W. Engelbright, consulting engineer on my staff, will testify as to the operating expenses.

Examiner Boyden: Let the forecast be marked as exhibit 22.

(Exhibit 22, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) In a telephone talk I had with one of the Examiners, he indicated that the Commission would like to have some information about the present condition of structures and equipment. Do you feel that the testimony you have already given covers those points, or do you wish to add anything?

A. We have referred maintenance on our way and structures, particular rail. The program of rehabilitation provides that all of that rail will be taken out of track in three years. We also have some deferred maintenance on our freight equipment. That also will be taken care of out of our rehabilitation fund.

(Testimony of Charles Elsey.)

Q. Do you think that is covered by your previous statement that at the end of the three-year period you will have a reasonably satisfactory road that can be operated without extraordinary maintenance? [1791]

A. That is correct.

Mr. Nicodemus: I have finished with this witness, Mr. Examiner.

Cross Examination

Q. (By Mr. Swaine) Mr. Elsey, in exhibit 3, which is headed "The Western Pacific Railroad Company's Plan of Reorganization, Annual Fixed Charges under Plan, \$1,027,036, Record of Present Company," are the figures contained in the second vertical column under the caption "Available for Interest" the figures of the Western Pacific Railroad Company as a separate entity or are they the consolidated figures of that company and all of the companies of which it owns a majority or more of the capital stock?

A. That is just the figures of the Western Pacific Railroad Company.

Q. They are the figures of the Western Pacific Railroad Company only?

A. Yes, sir.

Q. Are they the figures of net railway operating income, or do they include items for interest from subsidiaries?

A. Yes, sir.

Q. Which is it?

A. It includes interest received from subsidiaries.

(Testimony of Charles Elsey.)

Q. Is the interest which is there stated interest which was [1792] received in cash or interest received in obligations?

A. It was received in obligations during certain portions of the period.

Q. Will you please state the amount for each of the years which represents interest credited on the books of the Western Pacific Railroad Company to paid-in obligations, and state the companies whose obligations represent that interest?

A. Approximately \$600,000 a year obligations of the Sacramento Northern Railway.

Q. Have you prepared a statement of the net railway operating income of the Sacramento Northern?

A. No, sir.

Q. Can you state to the Examiner what the amount of the net railway operating income has been over this period of time?

A. No, sir, I have not the figures with me.

Q. Has it approximated this \$60,000 annually of interest?

A. I could not say, Mr. Swaine?

Q. How much do you think it would be?

A. I do not want to guess at the figures.

Mr. Swaine: I think, Mr. Examiner, it is rather relevant: He has now testified that in these figures "Available for Interest" is an item of \$600,000 a year—is that right?

The Witness: Yes, sir. [1793]

Mr. Swaine: —is an item of interest accrued to the Western Pacific Railroad Company from the

(Testimony of Charles Elsey.)

Sacramento Northern. I think it is relevant to the Commission and certainly to the first mortgage bond holders to know how good that item is.

May we therefore ask the witness to submit as an exhibit a statement of the net railway operating income, or perhaps we had better make it the total income of the Sacramento Northern, for this period, so that we can see to what extent that \$600,000 per year has been earned.

Examiner Boyden: You mean for the period covered in—

Mr. Swaine: 1929 to 1935.

Examiner Boyden: Would it not be better to have the total income account shown for that period?

Mr. Swaine: I agree. You get my point, do you not?

Mr. Nicodemus: Surely. We will do that.

Examiner Boyden: Will you have such an exhibit prepared, Mr. Nicodemus?

Mr. Nicodemus: We will be very glad to.

Q. (By Mr. Swaine). Turning to page 2 of the analysis of balance sheet, under "Investments in Affiliated Companies," the first item is those pledged under the first mortgage, and the first item under that is capital stock of the Salt Lake City Union Depot & Railroad Company.

Will you please explain what that company is?

[1794]

A. That is the depot company at Salt Lake City for our passenger terminal.

(Testimony of Charles Elsey.)

Q. Do you own all of the capital stock of that company? A. No, sir; 50 per cent.

Q. The next item is "Capital Stock of Sacramento Northern Railway, \$999,500."

I notice further down, pledged under general and refunding mortgage, \$500 in stock of the same company. Does that \$1,000,000 aggregate represent the entire stock of that company? A. Yes, sir.

Q. What is the Sacramento Northern Railway Company?

A. The Sacramento Northern Railway is an electrically operated company property approximately 275 miles in length, operating from San Francisco to Oakland, Sacramento, Marysville, Oroville and Chico, with branch lines to Woodland, in the Holland district, and to Vacaville.

Q. When did it go into operation?

A. I could not tell you.

Q. Before the Western Pacific Railroad Company? A. Yes, a portion of it.

Q. Is it actually paying any cash return, either by way of interest or dividends to the Western Pacific Railroad Company? A. No, sir. [1795]

Q. Is the Western Pacific Railroad Company making advances to it from time to time?

A. Yes, sir, for nominal amounts.

Q. Since in exhibit 3 the item "Available for Interest" included \$600,000 a year interest on advances to that company, I assume that those figures did not deduct the amount of advances to the company annually. Is that correct?

(Testimony of Charles Elsey.)

A. That is correct.

Q. Can you state the average amount of those advances? A. No, I cannot.

Q. Would it be as much as \$100,000 a year?

A. Oh, it might run slightly over \$100,000 a year.

Q. Does that mean, then, that this item "Available for Interest" is larger by about \$700,000 than the actual amount of cash which you would have had available for interest?

A. Approximately so. Mr. Swaine, I do not consider those debts of the Sacramento Northern a bad obligation. The Sacramento Northern, as I have figured, has quite a future. In the first place, the Sacramento Northern is the only interurban railroad that will operate over the new bridge from Oakland to San Francisco. We expect that our passenger revenue will increase very materially.

The Sacramento Northern recently constructed the [1796] Holland Branch, which taps a very rich agricultural district, and is showing very large improvements in traffic.

Q. All I want to do is to bring out the facts as to what cash we would have to collect this interest out of, that is all.

Do you think that the obligations which you have received could have been sold for cash, at par, so that you would have had this amount of cash available to pay this interest? A. No, sir.

(Testimony of Charles Elsey.)

Q. Do you think they could have been placed with banks to realize this amount of cash, so that this amount that you have entitled "Available for Interest" would really have been available for interest? A. I cannot answer that question.

Q. The answer to that question will somewhat be given by the income statement of the Sacramento Northern, will it not? A. Yes, sir.

Q. What is the next company, the Deep Creek Railroad Company?

A. The Deep Creek Railroad is a road approximately 40 miles in length, running from the main line at Wendover in Utah to the point of Gold Hill.

Q. Is the company paying any dividends? [1797]

A. No, sir.

Q. Do you have to make advances to it?

A. Very small.

Q. What do you mean by "very small"?

A. \$20,000 a year.

Q. Will you produce an income statement of the Deep Creek Railroad Company also?

A. We can, yes.

Q. Is that a wholly-owned company?

A. Yes, sir.

Examiner Boyden: For what years, Mr. Swaine?

Mr. Swaine: For the years 1929 to 1935, inclusive.

Q. What is the Standard Realty & Development Company?

A. The Standard Realty & Development Company is a wholly-owned subsidiary of the Western

(Testimony of Charles Elsey.)

Pacific, and is simply a convenience company for the handling of miscellaneous pieces of real estate.

Q. Does it return any dividends or interest?

A. No, sir.

Q. Has its income been such as to require the making of advances to it?

A. Practically nothing.

Q. There have been some?

A. Very small amounts, at times; might be two or three thousand dollars, something of that kind.

[1798]

Q. To complete the record, might it not be well similarly to produce its income statement for 1929 to 1935?

Examiner Boyden: Will you do so, Mr. Nicodemus?

Mr. Nicodemus: Yes.

Q. (By Mr. Swaine) The next item, "Sacramento Northern Railroad 5 per cent 20-year Gold Bonds, \$3,975,456.13".

Were those bonds issued for additions and betterments to the Sacramento Northern?

A. Yes, sir, and the purchase of the property.

Q. What?

A. Additions and betterments, and also for the purchase of the property before the Western Pacific became interested in the property.

Q. What is the item "Notes Receivable" under that? As this is printed in this "Analysis of Bal-

(Testimony of Charles Elsey.)

ance Sheet" the words "Notes Receivable" are indented correspondingly with the "Sacramento Northern" and not correspondingly with the "5 per cent 20-year Gold Bonds." I do not know whether that is intentional or whether those notes receivable really belong to the Sacramento Northern.

A. Those notes receivable are separate, Mr. Swaine.

Q. Whose notes receivable are they?

A. In favor of the Western Pacific.

Q. I know, but are they Sacramento Northern? I do not understand from the way it is indented if those are [1799] Sacramento Northern notes receivable, or are they notes receivable of other companies?

A. No, the Sacramento Northern.

Q. They are all Sacramento Northern?

A. Yes.

Q. What were they issued for by the Sacramento Northern?

A. Oh, for various purposes, additions and betterments of the Sacramento Northern, and advances of the—

Q. Advances to incurred deficits in operation?

A. Yes, sir.

Q. Can you state what part of the \$4,524,744 represents deficits in operation?

A. No, sir, I cannot.

(Testimony of Charles Elsey.)

Q. Would you get that figure and supply it for the record, please?

Examiner Boyden: Will you supply for the record, Mr. Nicodemus, an analysis of the item of "Notes Receivable" under the "Sacramento Northern" as an exhibit?

Mr. Nicodemus: We will.

Q. (By Mr. Swaine) The next items seem to be "Pledged Under General and Refunding Mortgage."

So far as the physical properties are concerned, the general and refunding mortgage is a lien junior to the first mortgage upon all the properties, is it not? A. That is correct. [1800]

Q. Are these items now listed under "Investments" only items in respect of which the general and refunding mortgage is a lien superior to the First Mortgage? A. That is correct.

Q. What is the Tidewater Southern Railway Company?

A. The Tidewater Southern Railroad is a feeder property that operates from Stockton southerly through the San Joaquin Valley for a distance of approximately 75 miles, serving the towns of Manteca, Modesto, Turlock, and Hilmar.

Q. Does it pay dividends to the Western Pacific Railroad Company? A. No, sir.

Q. Does it make any return by way of interest?

A. It is paying its interest and paying princi-

(Testimony of Charles Elsey.)

pals on the advances that have been made in the past.

Mr. Swaine: Will you produce also the income account of that road from 1929 to 1935, inclusive?

Examiner Boyden: Will you do so, Mr. Nicodemus?

Mr. Nicodemus: All that data is shown by the reports that we file annually with the Commission, which we stipulate may be referred to, so it is not necessary to offer these as exhibits, that we prepare a statement assembling the information that Mr. Swaine requests, but refer to those annual reports, if that is satisfactory.

Q. (By Mr. Swaine) As to this particular item there really [1801] is income coming in?

A. Yes, sir.

Q. That income is in the amount "Available for Interest" in exhibit No. 3?

A. No, sir. The interest on any advances that the Western Pacific has made to the Tidewater Southern will be included.

Q. The income received from the Tidewater Southern Railway Company by the Western Pacific Railroad Company is in the item "Available for interest" in the second column of exhibit 3?

A. That is correct.

Q. Do you know how much that has been in the aggregate over that period?

A. I could not give you that.

Q. As much as \$100,000?

(Testimony of Charles Elsey.)

A. No, the interest is not that much.

Q. It is a relatively small item?

A. Yes, sir.

Q. What I am trying to get at is whether the actual interest items that you have gotten in any measure offset these deficits that are also included in there as income. You think it is materially less than \$100,000?

A. Yes, sir.

Q. What is the Central California Traction Company? [1802]

A. The Central California Traction Company is a line operating between Stockton and Sacramento, serving a very rich agricultural district, the principal commodities being Tokay grapes. It is owned jointly by the Southern Pacific, Santa Fe, and Western Pacific in equal proportions.

Q. By the way, I think I forgot to ask you whether the Tidewater Southern was wholly owned by the Western Pacific.

A. No, sir. The Western Pacific owns approximately 98 per cent of the stock.

Q. Does the Central California Traction Company return income?

A. No, sir.

Q. Do you have to make advances to it from time to time?

A. Yes, sir.

Q. The advances that you have to make to it have not been deducted from the item "Available for Interest" as shown on exhibit 3?

A. That is correct.

Q. They have not been deducted?

A. No, sir.

(Testimony of Charles Elsey.)

Q. What is the Alameda Belt Line?

A. The Alameda Belt Line is property that is jointly owned by the Western Pacific, and Santa Fe, and serves the [1803] southerly arm of the estuary and reaches the larger terminals of the Encinal Terminals in Alameda.

Q. Has it paid dividends over this period, 1929 to 1935? A. No, sir.

Q. You have to make advances to it?

A. Practically none at all; very small.

Q. Such as you have made have not been deducted from the item "Available for Interest" under exhibit 3? A. No, sir.

Q. Do you have to make advances to the Salt Lake City Union Depot & Railroad Company?

A. Yes, sir.

Q. And similarly they have not been deducted?

A. No, sir.

Q. Those advances are to pay for operating expenses that the terminal itself is unable to earn?

A. Yes, sir, and they are pro rated on a wheelage basis between the two companies.

Q. What is the item of "Notes receivable" pledged under the general and refunding mortgage? A. I could not say.

Q. Could you prepare or have prepared an analysis of that item, please?

Examiner Boyden: Will you do so, Mr. Nicodemus?

(Testimony of Charles Elsey.)

Mr. Nicodemus: We will. [1804]

Mr. Swaine: I suggest, Mr. Examiner, that in the light of this testimony it would be very helpful, not only to the Commission but to the security holders if we could have a consolidated income statement of the company and all its subsidiaries prepared, so that we can see what really is available for interest.

Examiner Boyden: For how many years, Mr. Swaine?

Mr. Swaine: For 1929 to 1935. I think it ought to parallel this other exhibit. I would suggest that similarly a consolidated statement be made covering the period for which a forecast was prepared. I do not remember the number of the exhibit.

Examiner Boyden: Exhibit 22.

Mr. Swaine: 1936 to 1940.

Q. Perhaps I *may* in error. Was that forecast 1936 to 1940 prepared on the basis of the Western Pacific Railroad Company as a separate entity, or is that a consolidation? A. Separate.

Q. As a separate entity? A. Yes, sir.

Q. So you have taken in here as part of your income the accruals of interest on the Sacramento Northern? A. No, sir.

Q. You did not as to that one? [1805]

A. No, sir.

Q. Have you made any deductions for prospective advances to these subsidiaries that have not earned their way?

(Testimony of Charles Elsey.)

A. No, sir. It would not come into that kind of a statement.

Mr. Swaine: I think it might be well if we had also a forecast of the prospective operating deficits of the various subsidiaries for which the Western Pacific Railroad Company will be required to make advances during this 1936 to 1940 period.

Examine Boyden: Mr. Elsey, do you believe you can prepare such a forecast of operating deficits?

The Witness: It is rather difficult to prepare a forecast, for instance, of the Salt Lake City Union Depot & Railroad Company, and the Alameda Belt Line, as strictly operating units. We can prepare a statement for the Sacramento Northern and Tidewater Southern.

Mr. Swaine: They are the only two really important ones, are they not? The others are comparatively small?

The Witness: Yes.

Mr. Swaine: I think it would be helpful if we could see what you estimate as the financial burden upon this property by reason of carrying these subsidiaries over the next five years.

Mr. Nicodemus: I agree with you. I think we will under- [1806] take to do that.

Mr. Swaine: I do not want to ask anything that is the least bit unreasonable, but I do think we should have it.

(Testimony of Charles Elsey.)

Mr. Nicodemus: We may have the data here in Washington. I think we have. I think we can find it in the Commission's files.

Examiner Boyden: How soon could you prepare that statement?

Mr. Nicodemus: I cannot make a forecast of that. We will get right at it. We will undertake to do that.

Examiner Boyden: Will you prepare a consolidated income account for the years 1929 to 1935 for the Western Pacific, and a forecast of the deficits?

Mr. Nicodemus: We will undertake to annex to those two exhibits, supplementary statements covering this piece of information that Mr. Swaine asks.

Examiner Boyden: Please do so.

Q. (By Mr. Swaine) I notice, continuing on the balance sheet, under the item "Unpledged," \$3,338,356.42 advances to the Sacramento Northern Railway. Those are advances for operating deficits, are they? A. Not altogether.

Q. To what extent?

A. I could not say offhand. Of course, you understand, Mr. Swaine, that these various subsidiaries of ours are [1807] contributors of traffic to our main line. It is a principle on which we purchased these properties.

Q. I understand that perfectly. Of course, the revenues from the traffic which they have contrib-

(Testimony of Charles Elsey.)

uted to the main line are reflected in the amount available for interest? A. That is correct:

Q. But the deficit is not reflected?

A. No, sir.

Q. On page 4 of the balance sheet under Account No. 717 you have a total of current assets of \$413,679.59. What principle did you apply in determining these interest and dividends receivable were current assets?

Let me put it another way:

Are they included in that item because they are less than six months old, or are they included in that item because you really expect to be able to collect them?

A. I could not say. The auditor is here to explain these details, Mr. Swaine.

Q. Is it an arbitrary allocation under some accounting principle, or are they really items on which you expect to be able to realize cash within the reasonably near future?

A. I cannot answer that question.

Q. The auditor is here; perhaps he could supply the answer.

Mr. DeGraff: I do not know just what item that is you [1808] refer to.

Mr. Swaine: Take the big one, for example, "Accrued Interest on Sacramento Northern Railroad Bonds," "Accrued on Sacramento Northern Railroad Notes Receivable," "Accrued Interest on Sacramento Northern Railway Advances."

(Testimony of Charles Elsey.)

Those items comprise most of the item of \$413,679 current assets.

Examiner Boyden: Do you expect to have the auditor testify later on, Mr. Nicodemus?

Mr. Nicodemus: I intend to, yes.

Examiner Boyden: Can we save that question until he is on the stand?

Mr. Swaine: Yes. I thought we might have it in juxtaposition.

Q. Mr. Elsey, you stated the Reconstruction Finance Corporation had undertaken to provide \$10,000,000 of new money, conditioning the undertaking upon having its present obligations receive under the plan security pari passu with the first mortgage bonds. Is that undertaking of the Reconstruction Finance Corporation evidenced by any instrument in writing?

A. That is my understanding.

Mr. Nicodemus: It is evidenced by a letter which I think is already in evidence in connection with the corporate action of the debtor. I think Mr. Jones' letter [1809] stating this undertaking is in exhibit No. 1.

Q. (By Mr. Swaine) You are referring to a letter signed "Jesse H. Jones, Chairman," under date of July 20, 1935, addressed, "Dear Mr. Schumacher"?

A. I stated it was my understanding, Mr. Swaine, that the—

Q. Is that the only commitment?

(Testimony of Charles Elsey.)

Mr. Nicodemus: That is what I have in mind.

Mr. Swaine: That is the only commitment?

Mr. Nicodemus: In other words, some other correspondence, I think, preceded that.

Examiner Boyden: Please explain, Mr. Swaine, from what paper you were reading.

Mr. Swaine: I was reading from a copy of a letter dated July 20, 1935, which appears as an exhibit to a document which is called "Extracts Minutes Meetings Board of Directors, The Western Pacific Railroad Company in re/ Reorganization Plan."

Mr. Nicodemus: That was part of exhibit 2.

Mr. Swaine: I think this letter speaks for itself. It makes this commitment not upon the condition stated by Mr. Elsey but upon the condition that the Reconstruction Finance Corporation shall receive for its present indebtedness, 30 per cent in first mortgage bonds and 70 per cent in income mortgage bonds.

Mr. Nicodemus: That is correct. [1810]

Mr. Swaine: There is no commitment other than this on the part of the Reconstruction Finance Corporation, is that right?

Mr. Nicodemus: No, none at all.

Mr. Swaine: I suppose, Mr. Examiner, that this would be, as a matter of technical procedure, much better stated at the time of argument on the plan, but so that you will get the point, the institutional holders which I represent, who are acting through the so-called Ecker Committee, accept or are will-

(Testimony of Charles Elsey.)

ing to accept this plan provided the plan is desired by the Reconstruction Finance Corporation and provided the Reconstruction Finance Corporation does undertake a commitment to supply the new money and accept the treatment provided in the plan.

Our committee would oppose giving the Reconstruction Finance Corporation this character of treatment independently of the covenant to supply the \$10,000,000 or independently of corresponding treatment to the other securities.

The Reconstruction Finance Corporation letter does not refer either to the plan itself or to the treatment to be given to the other securities, therefore, our willingness to accept the plan is a relative matter and not an absolute one.

Examiner Boyden: Mr. Elsey, did you work out the details [1811] of this plan or were you involved in working out the details of the plan and the distribution of securities or allocation of securities to various creditors which is there proposed?

The Witness: To a certain extent, yes, sir.

Examiner Boyden: I notice that you used the term that the Reconstruction Finance Corporation's position was advanced as a result of their agreement to lend money for the reorganization. Did you mean by that that under the plan which you are presenting here the securities which they were to receive were more than they would have received if such an agreement had not been made?

The Witness: Yes, that is correct.

(Testimony of Charles Elsey.)

Mr. Swaine: Following that out, Mr. Examiner, the Reconstruction Finance Corporation's present indebtedness is secured by bonds which are wholly junior to the first mortgage bonds except for a few of these stocks. That is why I went over the balance sheet to show that those were not really earning properties. So that the Reconstruction Finance Corporation's present position is one wholly junior to that of the first mortgage bonds.

Our institutions, however, are willing that if the Reconstruction Finance Corporation supplies \$10,000,000 of new money on the basis indicated in the plan, it shall in part consideration for the supplying of new money be [1812] treated in respect of its existing indebtedness on a basis *pari passu* with the first mortgage bonds.

It is important to state it that way rather than to state it the way that it is stated in the letter, because should the Commission change the plan as an entirety, treatment *pari passu* of the Reconstruction Finance Corporation's present debt with the company's first mortgage bonds might be something wholly different from the securities which are stated in the Reconstruction Finance Corporation letter of July 20th.

Examiner Boyden: Then it is the position of the creditors whom you represent, Mr. Swaine, that the action of the Reconstruction Finance Corporation in lending new money to the new company under this reorganization and taking first mortgage

(Testimony of Charles Elsey.)

bonds as security or purchasing those bonds, is such action that it justifies this advanced treatment under the plan, is that correct?

Mr. Swaine: It supplies a consideration for the new money, which is satisfactory to us. In other words, let me put in this way: .

We doubt very much that anybody else would supply the money, ten million dollars, at 4 per cent. That ten million dollars is ranking *pari passu* with 30 per cent of our position. We get under the plan 30 per cent in new money, so as an additional consideration to the 4 per cent [1813] interest it is agreeable to us that their present position shall be advanced. The two things go together, that is, the new money has to be supplied first at 4 per cent, and secondly, for a security which ranks equal with our best 30 per cent; and the treatment of the existing debt must be *pari passu*.

Let me give a radical illustration to show how the thing might be changed:

Suppose that the Commission, in the light of the testimony here this morning, should decide that this property could not stand even \$25,000,000 fixed charge obligation and should say that for our bonds we would have to take 20 per cent instead of 30 per cent in new first mortgage bonds.

Suppose the Commission should also say, to take an extreme illustration which I am sure the Commission will not take, for the remaining 80 per cent we would have to take common stock.

(Testimony of Charles Elsey.)

Then our understanding of the arrangement with the Reconstruction Finance Corporation—unfortunately, we have not had very much contact with the Reconstruction Finance Corporation; this has all been through Mr. Schumacher—is that under a situation where we would get 20 per cent of new bonds and 80 per cent in common stock, the Reconstruction Finance Corporation would have to advance the [1814] money against 66-2/3 per cent in bonds and 33-1/3 per cent in common stock, and would then have to take for its present position 20 per cent in bonds and 80 per cent in common stock.

I have substantial doubt—I do not know whether counsel for the Reconstruction Finance Corporation is here; they have not entered an appearance—that the Reconstruction Finance Corporation would be willing to go ahead on that kind of a basis.

Therefore, I want to make it perfectly clear that this thing is entirely relative so far as ourselves and the Reconstruction Finance Corporation are concerned.

Examiner Boyden: We will take a short recess.
(Whereupon a short recess was taken.)

Examiner Boyden: Have you any further questions, Mr. Swaine?

Mr. Swaine: No.

Examiner Boyden: Are there further questions?

Mr. Willard: Will there be another witness to go into the basis of conversion under the plan?

(Testimony of Charles Elsey.)

Mr. Nicodemus: You mean conversion of securities?

Mr. Willard: Yes, from old to new.

—Mr. Nicodemus: The plan shows that, Mr. Willard.

Mr. Willard: Will you have a witness to tell how you arrived at it, whether it was by mathematics or intuition [1815] or compromise, valuation, or whatever it was?

Mr. Nicodemus: I will not, no. The plan speaks for itself on that. I do not think there is any witness that can testify as to that. That is a matter of negotiation over a long period of time. Different percentages were discussed, and the ones shown in the plan were finally arrived at. It is mathematical, however, because each creditor gets 100 per cent of his claim.

Mr. Willard: But you did not work out the values of the old obligations and allocate new securities based on those values?

Mr. Nicodemus: I have no witness that can testify how that was worked out except by a process of negotiation.

Mr. Willard: You do not intend to put in any evidence of that character?

Mr. Nicodemus: No.

Examiner Boyden: Mr. Elsey, did you prepare the estimates of future railway operating revenues which are set out in exhibit 22?

The Witness: No, sir.

(Testimony of Charles Elsey.)

Mr. Nicodemus: The next witness will testify to that.

Q. (By Examiner Boyden) Have you made a comparison of those with railway operating revenues during years prior to 1936?

A. I think you will find out that is the basis of our [1816] estimate, Mr. Examiner.

Q. On page 4 of your plan you show that total fixed and contingent charges under the plan for the new company will be \$3,931,892. That is in excess of the fixed charges of the company in the past, is it not? A. That is correct.

Q. Have you reviewed the past operations of the company with a view to determining to what extent they have been able to earn their fixed charges in the past? A. Yes, sir.

Q. Have you any information you can state for the record now with respect to that?

A. I can give you the figures showing the amount available for interest from 1922 to date.

Q. Could you give us the average amount available from 1922 to 1930, inclusive?

A. The amount available for interest in 1922 was in round figures, \$2,320,000.

Q. Have you an average there for the figures from 1922 to 1930?

A. No, I have not. I would say offhand it would be in excess of \$2,500,000.

Q. In other words, the carrier in the past has failed on the average to earn its fixed charges,

(Testimony of Charles Elsey.)

which are less than those which you propose to have for fixed and contingent [1817] charges in the reorganized company, is that correct?

A. That is correct, but you must remember that the Northern California extension did not start to operate until the latter part of 1931.

Q. Does your forecast, exhibit 22, include revenues from the Northern California extension?

A. Yes, sir.

Q. Can you state now how much those amount to?

A. No, I could not.

Q. The other witnesses will be able to give us that information?

A. Yes, sir.

Mr. Coulson: Mr. Examiner; it might be helpful if in that case Mr. Elsey would prepare an exhibit when he breaks down that future forecast as Mr. Swaine suggested, which shall have also the amount allocated to new elements of earning property, like the Northern California extension, for the forecast years, the amount of gross necessary.

Examiner Boyden: Gross railway operating revenues?

Mr. Coulson: Yes.

Examiner Boyden: Will you show that separately?

Mr. Nicodemus: I think perhaps that will be shown by the next witness, to some extent.

The Witness: Yes, sir, it will.

Q. (By Mr. Swaine) In the figures which you gave to the [1818] Examiner just a minute ago,

(Testimony of Charles Elsey.)

had you included interest accrued but not paid by subsidiary lines?

A. Yes, that can be furnished.

Q. No. When you said the income had averaged about two and one-half million dollars during that ten-year period, did that include as credit to income account the interest accrued but not actually paid?

A. Yes, sir.

Q. To what amount?

A. I could not say. It varies from year to year, Mr. Swaine.

Q. Could you tell us about the average? Half a million dollars? You said it was \$600,000 in this period.

A. That would be the maximum.

Q. You said it averaged \$600,000 in the period 1929 to 1935.

A. Yes.

Q. I just wondered what proportion of the \$2,500,000 is represented by that.

A. No, I could not.

Q. Had you deducted advances to meet deficits of operating income of subsidiaries in that figure?

A. Your advances to subsidiaries do not come into your income account.

Q. I rather imagined it did not. That is what I wanted to [1819] bring out.

Q. How much were *you* advances to subsidiaries over that period?

A. I could not say.

Q. If the figure is to be supplied, may it be supplied with a breakdown which will show what portion of the income is represented by interest ac-

(Testimony of Charles Elsey.)

erned but not paid in cash, and may there be a corresponding exhibit showing advances to subsidiaries to cover operating deficits?

Examiner Boyden: Will you furnish that information, Mr. Nicodemus, for the period 1922 to 1928, inclusive?

Mr. Nicodemus: He wants consolidated operations for that period, I take it?

Examiner Boyden: As I understand his request, it is merely to show the interest accrued but not collected, which is set out in the income account during that period.

Mr. Swaine: That is right.

Examiner Boyden: And the advances made to those companies to make up operating deficits during the same period, 1922 to 1928, inclusive.

The other exhibit which you are going to furnish will show the consolidated income account from 1929 to 1935, inclusive.

Mr. Nicodemus: Now you want to take that back to 1922?

Examiner Boyden: Not the consolidated income account; [1820] just merely the interest accrued and unpaid. Is that satisfactory?

Mr. Swaine: That is right.

Mr. Nicodemus: That is all right.

Q. (By Examiner Boyden) You stated, I believe, Mr. Elsey, that you would require \$9,000,000

(Testimony of Charles Elsey.)

of cash to place the railroad, the Western Pacific, in normal operating condition. Did you use that term? A. Yes, sir.

Q. In how many years would you spend the \$9,000,000? A. Three years.

Q. \$3,000,000 a year?

A. Practically about that. The heaviest expenditures—it is about that. It will average about that. We have laid the program out on the basis of the most economical method of handling the rehabilitation work.

Q. Are you familiar with the underlying details of the computations by which you arrived at the figure of \$9,000,000? A. Yes, sir.

Q. How did you obtain the figure?

A. From our survey made by our operating department, chief engineer and superintendent of motive power.

Q. Are the details of that survey available for us? A. Yes, sir. [1821]

Examiner Boyden: There will be a witness to present those, will there, Mr. Nicodemus?

Mr. Nicodemus: We had not intended to, but we will if you desire.

That is a breakdown of the program, the exhibit, covering the three-year period?

The Witness: Yes, sir, we have.

Mr. Nicodemus: We have one available?

The Witness: Yes, sir.

(Testimony of Charles Elsey.)

Mr. Nicodemus: It is already prepared, is it not?

The Witness: Yes, sir.

Mr. Nicodemus: We can offer it in connection with your testimony now?

The Witness: Yes, sir.

Mr. Nicodemus: We tried to reduce the number of exhibits to a minimum. This may be useful.

We offer this in evidence as a statement prepared at the request of President Elsey.

Examiner Boyden: Let the exhibit entitled "Program of Work for Rehabilitation During Approximately Three Years, 1936, 1937 and 1938," be marked exhibit No. 23.

(Exhibit 23, Witness Elsey, marked for identification.)

Q. (By Examiner Boyden) Right in that connection, does your exhibit 22, which is your forecast, reflect the [1822] amounts that you expect to spend for rehabilitation? A. No, sir.

Q. As charged to operating expense?

A. No, sir. Part of the plan is to request the Commission to charge all operating expenses in connection with the rehabilitation program to profit and loss.

Q. If the Commission does not agree to that, then this exhibit would have to be readjusted?

A. That is correct.

Q. (By Mr. Swaine). Mr. Elsey, I notice that each one of the items is headed "Extraordinary—

(Testimony of Charles Elsey.)

1936, 1937 and 1938," and the total is "Three-year Total Extraordinary," \$9,269,777. How much of that would you say represented deferred maintenance? Is it the difference between the \$9,269,777—

A. That is the total cost of the whole program, Mr. Swaine, \$9,509,777.

Q. Yes, but how much of that is deferred maintenance?

A. The maintenance of way and structures, outside of a few items such as on line No. 10, "Roadway machines and tools," \$40,000; and line No. 19, "Passing track extensions," "Turn-table" on line 20, Section facilities on line 28, "Roundhouse" on line 29, and "Turntable" on line 30, all the balance of it is deferred maintenance.

Q. Those items, looked at very, very hurriedly, do not [1823] amount to a million dollars, do they, in the aggregate? A. No.

Q. Then would you say that it was upwards of eight million dollars of deferred maintenance?

A. The proposition is that included in this total proposition is your capital charges on the—

Q. There are \$3,085,000 of capital charges, are there not? A. That is net, yes, sir.

Q. Does that mean that approximately \$6,500,000 would, if it were not for this extraordinary arrangement that has been suggested, be chargeable to operation?

(Testimony of Charles Elsey.)

A. There would be chargeable to operation, \$5,036,000.

Q. That is what I wanted to get at, \$5,036,000. That is really the deferred maintenance figure that is being made up? A. Yes, sir.

Q. In this compilation from 1929 to 1935, has the \$5,076,000 been deducted in determining the amount of income available for interest?

A. As I say, part of the plan is to charge those operating expenses to profit and loss.

Q. I understand; I am merely asking whether it has been deducted in the plan, or whether you deducted only actual maintenance of way and actual maintenance of equipment. I assume it is the latter.

[1824]

A. All of our expenses in the past have been chargeable to operating expenses.

Q. I have not made my point clear, I am afraid: You are now testifying that your actual expenses of maintenance of way and maintenance of equipment over ~~some~~ period, I do not know what it is, have been five million dollars less than it really should have been, is that right? To have kept your property in what you regard as a normal condition, you ought to expend approximately five million dollars more than you did spend? That is what you mean when you say it is deferred maintenance?

A. Certainly.

Q. I want to be sure that I am correct in that as-

(Testimony of Charles Elsey.)

sumption, that the \$5,000,000 has not been deducted in these figures on exhibit 3. A. No, sir.

Q. Over what period of time has that \$5,000,000 accrued? A. I could not say.

Q. When did you begin to have the first maintenance?

A. We started an improvement program in 1927.

Q. When did you stop it? A. 1930.

Q. At the end of 1930?

A. Yes, sir. There might have been a few charges run [1825] over into 1931.

Q. So that means that that five million dollars of deferred maintenance has accrued over the last five years?

A. It is pretty hard to say that. The proposition is, as far as your rail is concerned, —

Q. If you had kept your property up to normal, what you are now testifying to really means that you should have spent a million dollars a year more on maintenance during those years?

A. That is correct.

Mr. Swaine: I am a little puzzled by the place we come out. If he should have spent a million dollars a year more than you did spend, and if you have in exhibit No. 3 an average of \$600,000 a year of uncollectible interest from the Sacramento Northern and others, and also have failed to deduct about \$100,000 a year of advances to meet operating deficits of subsidiaries, it looks to me as if you would have a red figure in every one of the five

(Testimony of Charles Elsey.)

years, and that is the thing that puzzles me. I am not arguing, I am just trying to get at the facts.

Q. (By Mr. Coulson) I am not clear, Mr. Elsey, as to this prior rehabilitation program. I understand you to say that was authorized in 1926 and discontinued in 1930. Is that correct?

A. Yes, sir. [1826]

Q. What was the total of rehabilitation expenditures contemplated by that program?

A. I could not say offhand, Mr. Coulson.

Q. You cannot tell us what part of the expenditures contemplated by that program had been completed at the time the program was discontinued at 1930?

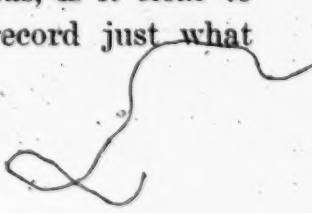
A. No, sir.

Q. Can you supply the Commission with that information in the form of a statement of the original program and a statement of the amount of work done to the date of abandonment of the program at the beginning of the depression?

A. That can be done, yes, sir.

Mr. Coulson: I would like to ask, Mr. Examiner, that that be done. I think it will clear up the point that puzzles Mr. Swaine as to the extent to which the deferred maintenance as to which expenditures are now contemplated and in part authorized by the Commission and the court accrued during the five years just past.

Examiner Boyden: Mr. Nicodemus, is it clear to you from the statement on the record just what counsel has asked for?



(Testimony of Charles Elsey.)

Mr. Nicodemus: It is.

Examiner Boyden: Will you prepare such a statement?

Mr. Nicodemus: I will undertake to prepare it.

[1827]

Q. (By Examiner Wilkinson) Mr. Elsey, to clarify my understanding of your plan, this \$10,000,000 to be supplied by the Reconstruction Finance Corporation is to be used primarily for rehabilitation. \$500,000 is to be put into the contingency fund, which would leave you \$9,500,000.

Does not the plan also contemplate that out of the \$9,500,000, any deficiency in fixed charges may be made good? A. That is correct.

Q. In other words, the \$10,000,000 may not be used for rehabilitation, but may be used to pay interest?

A. That is the way the plan reads, but in view of the fact that this program is going to be finished in three years, I cannot see from our past experience that we will ever call on any portion of that \$9,500,000 for anything other than the rehabilitation program.

Mr. Coulson: May I ask Mr. Elsey one question, Mr. Examiner?

Examiner Boyden: Yes.

Q. (By Mr. Coulson) Has any part of the expenditures shown by your exhibit 23 for the purpose of rehabilitation of the property already been authorized by the Commission or the court?

(Testimony of Charles Elsey.)

A. Yes, sir, all of the expenditures we propose to do, [1828] in the year 1936, have been authorized by the court, and the Commission has already authorized issuance of trustee's certificates to take care of that amount of work.

Q. Has the court acted as yet on the issuance of those trustee's certificates? A. No, sir.

Mr. Nicodemus: Not so far as we are advised. They may have entered an order, but they would not have done it yet. They may enter an order today.

The Witness: We expect the order today.

Examiner Boyden: Will you explain, please, Mr. Elsey, what treatment you propose to give the certificates issued in connection with the rehabilitation program and the plan of reorganization?

The Witness: The proposition is that the Reconstruction Finance Corporation has agreed to purchase the \$3,000,000 of trustee's certificates, and exchange those trustee's certificates for the 4 per cent first mortgage bonds of which the Reconstruction Finance Corporation has agreed to purchase the \$10,000,000.

Examiner Boyden: On a dollar-for-dollar basis?

The Witness: Yes, sir.

Mr. Clay: We were detained at another hearing across the hall this morning, involving an issue of the Missouri Pacific. May I enter the appearance of Mr. Alley, Gen- [1829] eral Counsel for the Reconstruction Finance Corporation; Judge McChord, Special Counsel; and myself, C. M. Clay, for the Reconstruction Finance Corporation.

(Testimony of Charles Elsey.)

I would like to ask a question at this time:

Q. Mr. Elsey, has there been any letter or other writing given, binding the Reconstruction Finance Corporation to take first mortgage bonds for any part of these trustee's certificates?

A. I could not say. I have been advised by our chairman of the executive committee that that was the arrangement.

Q. Are you not president of the road?

A. What is that?

Q. Would you not know if any had been given?

A. Not as a definite proposition.

Q. That is, it might be done in New York and therefore you would not know about it?

Mr. Nicodemus: There is such a letter.

Mr. Swaine: I would like to see the letter, too, if there is one.

Mr. Nicodemus: I do not know whether we brought it along.

Mr. Clay: I know of none.

Mr. Nicodemus: Mr. Jones wrote it.

Mr. Clay: Not to take first mortgage bonds for the trustee's certificates. [1830]

Mr. Swaine: They agreed to take the certificates. They did not agree to make the exchange. That bears on the point I made before.

Mr. Clay: That letter was not a commitment for \$10,000,000 but it was a commitment to underwrite three million dollars, was it not, Mr. Elsey?

(Testimony of Charles Elsey.)

Mr. Nicodemus: He says he has not seen the letter, it was written to the trustees. But we will put that letter in evidence.

Mr. Clay: Can we call for that, to have it put in evidence?

Mr. Nicodemus: Yes, if we have it with us; otherwise you can put in a copy.

Examiner Boyden: Let us have the letter, if there is one.

Mr. Willard: Will you put in the letter of June 24th, also, that is referred to in the letter of July 20th?

Mr. Nicodemus: We will produce those original letters after lunch. It will take some time to dig them up. I think it will delay the proceedings unnecessarily.

Examiner Boyden: Shall we pass that now, Mr. Clay, until this afternoon?

Mr. Clay: Yes.

Q. (By Examiner Boyden) Mr. Elsey, I believe you made reference to approximately \$30,000,000 of uncapitalized [1831] capital expenditures of the Western Pacific. Have you the computations of that figure with you? A. I think we have.

Q. Will you produce them for the record, please?

A. Yes, sir. That is \$22,000,000, and the \$3,000,000 is for the improvement program, and the \$5,000,000 is the amount of money that the A. C. James Company put into the Northern California Extension, making a total of \$30,000,000.

(Testimony of Charles Elsey.)

Mr. Swaine: That latter item was capitalized, was it not? It is the very note for which the securities are given under this plan.

The Witness: This is simply a switch, so far as the A. C. James Company is concerned.

Mr. Swaine: But it is capitalized?

The Witness: Yes.

Mr. Coulson: Only in a temporary form. It is not permanently capitalized.

Examiner Boyden: You will furnish a statement of the figure, \$22,000,000, then?

The Witness: Yes, sir.

Mr. Nicodemus: If counsel are through, our next witness will be the freight traffic manager.

Examiner Boyden: Are there any further questions of Mr. Elsey? [1832]

Do counsel agree that the additional exhibits which we have requested may be presented for the record without further examination of Mr. Elsey?

Mr. Swaine: Yes, as far as I am concerned.

Mr. Willard: We may desire an opportunity to examine him on them later, after we have seen them.

Examiner Boyden: Mr. Elsey is temporarily excused, then.

(Witness temporarily excused.)

Examiner Boyden: Is there any objection to the exhibits numbered 4 to 23, inclusive, which are offered by the Debtor through Mr. Elsey?

(Testimony of Charles Elsey.)

Mr. Willard: There again, Mr. Examiner, we have not seen this material before today, and we have not had an opportunity to go through it carefully. We would like to have an opportunity to do it before the witnesses are finally excused.

Examiner Boyden: You may do that, but have you any objection to the receipt of the exhibits in evidence now?

Mr. Willard: No.

Examiner Boyden: They are received as marked.

(Exhibits 4 to 23, inclusive, Witness Elsey, received in evidence.)

1922
1922

THE WESTERN PACIFIC RAILROAD COMPANY
REORGANIZATION PLAN
A FORECAST OF REVENUES, EXPENSES AND INCOME

F.D. 10913

Exhibit No. 22

Witness: *Elmer*

Filed March 23, 1936

	1926	1927	1928	1929	1930
1 ASSUMED OPERATING REVENUES - The Western Pacific Railroad Company					
2 Freight Revenue.....	\$12,835,000	\$13,831,000	\$15,037,000	\$16,338,000	\$17,920,000
3 Passenger Revenue.....	485,000	506,000	1,008,000	1,511,000	1,809,000
4 Mail, Express, Dining & Buffet and other Passenger Train Revenues.....	172,000	237,000	299,000	384,000	599,000
5 Miscellaneous Other Revenues - Net.....	186,000	180,000	194,000	210,000	227,000
6 Total Railway Operating Revenues.....	13,478,000	15,054,000	16,538,000	18,253,000	20,655,000
7 OPERATING EXPENSES (Excluding Operating Expense of Rehabilitation Program)					
8 Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work - Note 1.).....	2,120,000	2,180,000	2,250,000	2,400,000	2,575,000
9 Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work - Note 1.).....	2,088,000	2,225,000	2,350,000	2,700,000	3,109,000
10 Traffic Expense.....	845,000	885,000	715,000	730,000	780,000
11 Transportation Expense.....	8,045,000	8,419,000	8,778,000	8,950,000	9,390,000
12 Miscellaneous Expense.....	92,000	100,000	100,000	115,000	125,000
13 General Expense.....	980,000	975,000	800,000	585,000	550,000
14 Transportation for Investment - Credit.....	(75,000)	(75,000)	(75,000)	(75,000)	(50,000)
15 Total Railway Operating Expenses (As qualified above).....	10,971,000	10,979,000	11,618,000	12,870,000	13,540,000
16 Railway Tax Accruals - Regular Items.....	648,000	680,000	780,000	830,000	1,080,000
17 Excise Taxes (Ordinary Expense Payrolls, Railroad Retirement and Social Security).....	327,000	355,000	450,000	485,000	515,000
18 Excise Taxes (Rehabilitation Program Payrolls, Railroad Retirement and Social Security).....	80,000	84,000	41,000	--	--
19 Hire of Equipment - Net Debt.....	1,030,000	1,100,000	1,150,000	1,175,000	1,200,000
20 Joint Facility Rents - Net Credit.....	(155,000)	(180,000)	(195,000)	(210,000)	(225,000)
21 NET RAILWAY OPERATING INCOME.....	1,894,000	2,114,000	2,897,000	3,423,000	3,785,000
22 OTHER INCOME (Assuming Plan of Reorganization is effective January 1, 1928)					
23 Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company).....	382,000	387,000	389,000	124,000	171,000
24 Miscellaneous Interest and Other Rents from Road and Equipment.....	141,000	143,000	147,000	151,000	154,000
25 Total Other Income (Note 2).....	423,000	430,000	536,000	275,000	325,000
26 TOTAL INCOME.....	1,747,000	2,544,000	3,073,000	3,738,000	4,110,000
27 MISCELLANEOUS DEDUCTIONS FROM INCOME					
28 All items other than interest on Funded Debt.....	121,000	120,000	117,000	115,000	113,000
29 Balance Available for Interest on Funded Debt.....	1,626,000	2,424,000	2,956,000	3,623,000	3,997,000
30 Deduct interest on Equipment Trusts and Lease-Conditional Sale Agreement (Note 3).....	121,250	82,875	45,215	24,772	17,875
31 Deduct interest on \$15,075,900 of 4 1/2 Bonds (Exchanged Series).....	927,036	827,036	827,036	827,036	827,036
32 Deduct interest at 4 1/2 on new Bonds sold to finance 3-Year Rehabilitation Program (Note 4).....	65,000	180,000	330,000	600,000	600,000
33 Total Fixed Interest on Funded Debt.....	813,715	890,911	1,002,251	1,051,808	1,044,912
34 AVAILABLE NET INCOME AS DEFINED BY PLAN OF REORGANIZATION.....	812,284	1,534,089	1,953,749	2,561,192	2,965,088
35 Deduct amount required for maintenance of Contingency Reserve Fund (Note 5).....	--	--	--	--	--
36 Deduct disbursements through Capital Fund (Note 6).....	500,000	500,000	500,000	500,000	500,000
37 Balance Available for Interest on Income Bonds - Series "A" and Series "B".....	312,284	1,034,089	1,453,749	2,061,192	2,465,088
38 Deduct for interest earned and payable on Series "A" and Series "B" Bonds (Note 7).....	312,284	1,034,089	1,453,749	2,061,192	2,297,612
39 Deduct remainder available to apply against unpaid interest accumulation on Income Bonds.....	--	--	--	--	124,376
40 Balance Available for Sinking Fund (\$104,484 required annually).....	--	--	--	--	--
41 Deduct Sinking Fund Payments (1/25 on \$30,397,000 Series "A" Bonds).....	--	--	--	--	--
42 Balance Available for Interest on Junior Lien Bonds.....	--	--	--	--	--
43 Deduct interest at 6% on \$8,092,700 Junior Lien Bonds.....	--	--	--	--	--
44 Balance Available for Interest Fund.....	--	--	--	--	--
45 Deduct for Interest Fund (10% of balance shown by Line 44).....	--	--	--	--	--
46 NET INCOME - Available for Dividends and General Corporate Purposes.....	--	--	--	--	--

GENERAL
This estimate based on Plan of Reorganization filed with United States District Court and the Interstate Commerce Commission on February 8, 1936.

NOTE 1
Maintenance costs shown for 1926, 1927 and 1928 do not include operating charges incident to the Rehabilitation Program. Plan of Reorganization contemplates such expense will be charged to Profit and Loss during these years.

NOTE 2
"Other Income" does not include income from certain obligations issued by the Sacramento Northern Railway, Tidewater Southern Railway Company, and Deep Creek Railroad Company (subsidiaries of Western Pacific), which is currently reported by Western Pacific, since it is proposed to convert such obligations to non-interest bearing status.

NOTE 3
Interest shown for Equipment Trusts and Lease-Conditional Sale Agreement provides only for present obligations. No charges for new equipment obligations can be included herein since definite plans are not at present available.

NOTE 4
Bonds will be sold to provide funds for Rehabilitation Program as needs arise and are herein considered as shown below:

Year	Bonds Sold During Year	Outstanding End of Year	Average for the Year	4 1/2% Interest on Average
1926	\$5,000,000	\$ 3,000,000	\$ 1,625,000	\$ 65,000
1927	3,800,000	6,800,000	4,780,000	190,000
1928	3,800,000	10,000,000	6,880,000	330,000
1929	None	10,000,000	10,000,000	400,000
and subsequently:				

NOTE 5
No resort to the Contingency Reserve Fund set up by the Plan of Reorganization is expected to be necessary during periods shown.

NOTE 6
Capital Fund disbursements up to limit set by Plan of Reorganization are expected to be required for payments on Equipment Trusts, advances to subsidiaries for deficits or additions and betterments thereon, Western Pacific routine additions and betterments, etc.

NOTE 7
Full 8-1/2% interest on Income Bonds Series "A" and Series "B" amounts to \$2,297,612 annually on basis of no conversions of Series "B". Such interest is to be payable each six month period in fractions of 1/4% or multiples thereof, but, for simplicity, entire amounts available have here been allocated and on an annual basis.

Note: Figures in parentheses, viz: () denote red.

Office of the President,
San Francisco, Calif.,
March 10th, 1936.

(Exhibit No. 22—continued)
The Western Pacific Railroad Company
PLAN OF REORGANIZATION
RATIOS OF OPERATING EXPENSES TO OPERATING REVENUES

Operating Expenses (Excluding Operating Expenses of Rehabilitation Program)	1936	1937	1938	1939	1940
Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 1.).....	\$2,120,000 (15.8%)	\$2,150,000 (14.3%)	\$2,250,000 (13.6%)	\$2,400,000 (13.1%)	\$2,575,000 (13.1%)
Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 1.)	2,058,000 (15.3%)	2,225,000 (14.8%)	2,350,000 (14.3%)	2,700,000 (14.7%)	3,100,000 (15.8%)
Traffic Expense	663,000 (04.9%)	685,000 (04.6%)	715,000 (04.3%)	730,000 (04.0%)	750,000 (03.8%)
Transportation Expense	5,063,000 (37.7%)	5,419,000 (35.9%)	5,778,000 (35.1%)	6,250,000 (34.0%)	6,290,000 (32.1%)
Miscellaneous Expense	92,000 (00.6%)	100,000 (00.6%)	100,000 (00.6%)	115,000 (00.6%)	125,000 (00.6%)
General Expense	450,000 (03.4%)	475,000 (03.2%)	500,000 (03.0%)	525,000 (02.8%)	550,000 (02.8%)
Transportation for Investment—Credit	75,000* (00.5%)*	75,000* (00.5%)*	75,000* (00.5%)*	50,000* (00.3%)*	50,000* (00.3%)*
Total Railway Operating Expenses (As qualified above).....	10,371,000 (77.2%)	10,979,000 (72.9%)	11,618,000 (70.4%)	12,670,000 (68.9%)	13,340,000 (67.9%)

Note 1—Maintenance shown excludes Operating Expenses due to 3 year Rehabilitation Program which are expected to be charged to Profit and Loss.

*Denotes red figures.

[Endorsed]: F. D. 10913. Exhibit 22. Witness Elsey. Filed Mar. 23, 1936.

Examiner Boyden: We will adjourn now until 2 o'clock.

(Whereupon, at 12:25 o'clock p. m. a recess was taken until 2 o'clock p. m. of the same day.) [1833]

PROCEEDINGS

Examiner Boyden: Are there any additional appearances?

Mr. Wood: W. L. Wood for Milbrook, Tweed, Soper & Webb, New York City, representing the trustees of the first mortgage and the trustee of the general and refunding mortgage.

Examiner Boyden: Mr. Wood, you will arrange to file application for leave to practice before the Commission?

Mr. Wood: Yes, sir.

Examiner Boyden: Are there any other appearances?

(No response.)

You may proceed, Mr. Nicodemus.

Mr. Nicodemus: I call Mr. Bon.